CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 873

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL., PETITIONERS

vs.

JOHN AGNEW, F. O. FAYERWEATHER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MARCH 19, 1946
CERTIORARI GRANTED APRIL 29, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 973

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL., PETITIONERS

vs.

JOHN AGNEW, F. O. FAYERWEATHER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Proceedings in United States Court of Appeals for the District of Columbia	1	1
Caption	1	1
Appendix to appellant's brief	1	1
Complaint (petition for writ of certiorari)	2	1
Exhibit A—Order of removal issued by Board of Governors of Federal Reserve System	9	6
Exhibit B—Opinion, findings of fact and conclusions of law	10	7
Motion for writ of certiorari	20	14
Motion to dismiss	22	15
Amended complaint for writ of certiorari or, in alternative, for an injunction	23	16
Motion of the individual defendants to dismiss	25	17
Judgment	26	18
Minute entry of hearing	28	19
Opinion, Prettyman, J	29	20
Dissenting opinion, Edgerton, J	41	33
Judgment	45	37
Designation of record	45	38
Clerk's certificate [omitted in printing]	46	38
Order allowing certiorari	47	39

1 In the United States Court of Appeals for the District of Columbia.

Civil Action No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, CARE: DAVIES & DAVIES, ATTORNEYS, PATERSON NATIONAL BANK BUILDING, PATERSON, NEW JERSEY, PLAINTIFFS

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, WASHINGTON, D. C., DEFENDANT

Appeal From the District Court of the United States for the District of Columbia

Appendix to appellant's brief

2 In the District Court of the United States for the District of Columbia

Civil Action No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, CARE: DAVIES & DAVIES, ATTORNEYS, PATERSON NATIONAL BANK BUILDING, PATERSON, NEW JERSEY, PLAINTIFFS

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, WASHINGTON, D. C., DEFENDANT

Complaint

Filed April 28, 1945

PETITION FOR WRIT OF CERTIORARI

The plaintiffs, John Agnew and F. O. Fayerweather, respectfully state that they are citizens of the United States and residents of the City of Paterson, State of New Jersey, and bring this action on their own behalf for the reasons hereinafter set forth:

1. The defendant, Board of Governors of the Federal Reserve System, is an administrative and quasi-judicial tribunal having its principal office in the City of Washington, District of Columbia, and is organized under and by virtue of the Act of December 23, 1913, Ch. 6, 38 Stat., p. 251, known as the "Federal Reserve Act," and certain acts amendatory thereof.

2. Plaintiffs represent that for a number of years past both plaintiffs have been duly elected, qualified and acting directors

of The Paterson National Bank of Paterson, New Jersey, the plaintiff, F. O. Fayerweather, having been a director of the said bank since January 13, 1925, and the plaintiff, John Agnew, having been a director of said bank since November 27, 1934. Both plaintiffs were reelected directors at each successive meeting of the shareholders after their original election, including the
3 shareholders meeting of January 11, 1944, and the shareholders meeting of January 9th, 1945. Following all such elections each took the director's oath prescribed by Section 5147 of the Revised Statutes of the United States as amended. They have performed their duties faithfully and according to law.

3. The Paterson National Bank is a national banking association and a member of the Federal Reserve System. Plaintiffs and their families are owners of a substantial amount of stock in said banking institution, holding approximately 1,000 shares out of a total of 12,000 shares outstanding.

4. On the 23rd day of March, 1945, the defendant, Board of Governors of the Federal Reserve System, removed the plaintiffs as such directors upon the claim of a violation of Section 32 of the Banking Act of 1933, as amended (U. S. C. Title 12, Sec. 78), a copy of said order of removal being hereunto annexed and marked Exhibit "A" and is prayed to be taken and read as a part hereof.

Said Section 32 of the Act of 1933 provides as follows:

"SEC. 32. Certain persons excluded from serving as officers, directors or employees of member banks.

No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, *primarily engaged* in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments. (June 16, 1933, c. 89, § 32, 48 Stat. 194; Aug. 23, 1935, c. 614, § 307, 49 Stat. 709.) [Italics ours.]

4 The claimed authority of the defendant to hear and decide the matter is contained in Section 30 of the aforesaid Banking Act of 1933 (U. S. C. Title 12, Sec. 77) which provides as follows:

"SEC. 77. Removal of director or officer.

Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust com-

pany doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank, affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: Provided, That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court. (June 16, 1933, c. 89, § 30, 48 Stat. 193; Aug. 23, 1935, c. 614, § 203 (a), 49 Stat. 704.)

5. On June 29, 1944, the Comptroller of the Currency, pursuant to the provisions of the aforesaid Section 30, certified to the defendant that in his opinion plaintiffs had violated the provisions of the aforesaid Section 32 of the said Act and were continuing so to do after having been warned by him to discontinue such violations, in that, while serving as directors of the afore-

said bank during the years 1942, 1943 and 1944, they were during such time employees of an investment firm primarily engaged in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds or other similar securities. Thereupon on August 9, 1944, the defendant issued an order notifying plaintiffs to appear and show cause why they should not be removed from office as directors of said bank. The defendant Board did not itself hold such hearings, but instead appointed a "hearing officer", although no provision therefor was contained in the Act pursuant to which the Board claimed to act. Thereafter hearings were conducted by such "hearing officer" at the Federal Reserve Bank in New York during the months of October and December, 1944. Plaintiffs appeared at these hearings by counsel and protested upon the ground, among others, that under the language of
6 Sec. 30 of the Banking Act of 1933, as amended, the Board of Governors of the Federal Reserve System was the only body authorized by law to hold the hearings, and also filed certain other motions, set forth in the record, all of which were overruled by the Board.

6. Both plaintiffs were and are employees in the Paterson, New Jersey, office of Eastman Dillon & Co., a partnership, engaged in the brokerage and securities business and having its principal office in the City of New York, N. Y.

Eastman Dillon & Co., acts as broker or as principal in executing orders on the New York Stock Exchange, the Curb Exchange and the Philadelphia Exchange. It buys and sells securities either as broker or principal at wholesale or retail.

In the "underwriting field" (meaning the issue, flotation, underwriting, public sale or distribution at wholesale or retail or through syndicate participation of stocks, bonds or other similar securities) the market value of securities which were bought and sold by Eastman Dillon & Co., as agent and for its own account over an indefinite period amounted only to about 15% of the total market value.

In total number of transactions during an indefinite period prior to September 20, 1943, those in the "underwriting field" would amount to a similar percentage (15%) of the total number.

Eastman Dillon & Co., does business on a fiscal year basis ending the last day of February. For the fiscal year ending February 28, 1943, its gross income from the "underwriting field" amounted to 26% of its gross income from all sources, while its gross income from brokerage business (acting as agent in buying and selling for others) amounted to 42% of its gross income from all sources. For the fiscal year ending February 29, 1944,

its gross income from the "underwriting field" amounted to 32% of its income from all sources, while its gross income from its brokerage business amounted to 47% of its income from all sources.

7. All of the foregoing averments were found as facts by the defendant Board. Plaintiffs therefore aver that upon the
7 record made there was and is no valid basis for a charge that Eastman Dillon & Co., was "primarily engaged" in the underwriting of securities business or that plaintiffs have been guilty of the violation of Sec. 32 of the Banking Act.

8. Petitioners are advised by counsel and aver that the said opinion, findings of fact, conclusions of law and order are in disregard of the statutory provisions affecting the matter hereinbefore recited, are contrary to the express provisions of Sec. 32 of the Banking Act of 1933, as amended (U. S. C. Title 12, Sec. 78), are in excess of the jurisdiction of said Board and are in legal effect null and void. True copy of said opinion, findings of fact and conclusions of law, dated the 23rd day of March, 1945, is annexed hereto as Exhibit "B" and is prayed to be taken and read as a part hereof.

9. Petitioners aver that they were and are prejudiced by the said order of the said Board of Governors entered the 23rd day of March, 1945, wherein and whereby they were removed from their said offices as directors of the Paterson National Bank of Paterson, New Jersey, and deprived of the same and of the emoluments thereof, all without due process of law guaranteed them by the Fifth Amendment of the Constitution of the United States and that since they have no remedy by appeal or otherwise, they have a right to have said action of said Board of Governors reviewed by this Honorable Court.

Wherefore, The Premises Considered, the plaintiffs pray:

1. That a writ of certiorari may be awarded them directed to the Board of Governors of the Federal Reserve System commanding it to certify to this Honorable Court the complete record and proceedings in the matter hereinbefore recited to the end that this Court may review the same and consider and determine whether the said Board of Governors had jurisdiction and authority to make an issue the aforesaid order dated the 23rd day of March, 1945, and that upon such consideration of the record and proceedings and order, dated the 23rd day of March, 1945,
8 this Court may decree the same to be beyond the scope and power of the said Board of Governors and in excess of its jurisdiction, and null and void.

2. And for such other relief as to the Court may seem meet and proper.

JOHN AGNEW,
F. O. FAYERWEATHER,
Petitioners % Davies & Davies,
Paterson National Bank Bldg., Paterson, New Jersey.

HUGH H. OBEAR,
Attorney for Petitioners,
822 Southern Building, Washington, D. C.

DAVIES & DAVIES,
% Davies & Davies,
Paterson National Bank Building, Paterson, New Jersey.

DOUGLAS, OBEAR & CAMPBELL,
822 Southern Building, Washington, D. C.
Of Counsel.

[*Duly sworn to by John Agnew and F. O. Fayerweather; jurat omitted in printing.*]

9 *Exhibit A to complaint*

28726

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
WASHINGTON, DISTRICT OF COLUMBIA

IN THE MATTER OF JOHN AGNEW AND F. O. FAYERWEATHER, DIRECTORS, THE PATERSON NATIONAL BANK, PATERSON, NEW JERSEY

Order

Preston Delano, Comptroller of the Currency of the United States, being of the opinion that John Agnew and F. O. Fayerweather as directors of The Paterson National Bank, Paterson, New Jersey, have continued to violate section 32 of the Banking Act of 1933, as amended (U. S. C., title 12, sec. 78), a law relating to such natoinal banking association, after having been warned by the Comptroller of the Currency to discontinue such violations; and having, under date of June 29, 1944, certified the facts relating to such violations of law to the Board of Governors of the Federal Reserve System; and the Board having caused due notice to be served upon the said John Agnew and F. O. Fayerweather to appear and show cause why they should not be removed from office as directors of The Paterson National Bank, Paterson, New Jersey; and the said John Agnew and F. O. Fayerweather having appeared in person and by attorney; and the

Board having considered all of the motions filed in their behalf, all of the evidence, and all of the argument; and the Board having made its findings of fact and conclusions of law:

It is ordered by the Board that the motions heretofore filed in behalf of the said John Agnew and F. O. Fayerweather be and the same are hereby overruled.

It is further ordered by the Board that the said John Agnew and F. O. Fayerweather and each of them be and, when a copy of this order has been served upon each of them and upon the bank as hereinafter directed, each is thereby removed from office as a director of The Paterson National Bank, Paterson, New Jersey, and each thereupon shall cease to be a director of said bank.

It is further ordered and directed that the Secretary of this Board cause a copy of this order to be served upon the said John Agnew and upon F. O. Fayerweather and a copy of the same to be served upon The Paterson National Bank, Paterson, New Jersey.

By direction of the Board of Governors this 23rd day of March, A. D. 1945.

(S.) CHESTER MORRILL,
Secretary.

I, Chester Morill, Secretary of the Board of Governors of the Federal Reserve System, do hereby certify that the foregoing is a true and complete copy of an order of the Board of Governors of the Federal Reserve System, the original of which order is on file among the records of the Board of Governors of the Federal Reserve System.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Board of Governors of the Federal Reserve System to be affixed at the City of Washington on the 23rd day of March, 1945.

[SEAL]

(S.) CHESTER MORRILL,
Secretary—Board of Governors.

Exhibit B to complaint

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
WASHINGTON

IN THE MATTER OF JOHN AGNEW AND F. O. FAYERWEATHER, DIRECTORS, THE PATERSON NATIONAL BANK, PATERSON, NEW JERSEY

Opinion

This is a proceeding under the applicable provisions of the Banking Act of 1933, as amended, hereinafter referred to as the Act) to determine whether John Agnew and F. O.

11 Fayerweather (hereinafter referred to as Respondents) or either of them should be removed from office as directors of The Paterson National Bank, (Hereinafter referred to as the Bank) Paterson, New Jersey. The authority of the Board of Governors of the Federal Reserve System to hear and decide
12 the matter is contained in section 30 of the Act,* which provides inter alia that, upon a certification by the Comptroller of the Currency that any officer or director of a national bank has continued to violate any law relating to such bank after having been warned by the Comptroller to discontinue such violations, the Board may cause notice to be served upon such officer or director to appear before it to show cause why he should not be removed from office. The section further provides that if the Board, after granting such officer or director a reasonable opportunity to be heard, finds that he has continued to violate such law after having been warned as aforesaid, the Board in its discretion may order that such director or officer be removed from office. In this matter, the Board received a certificate from the Comptroller of the Currency under date of June 29, 1944, reciting, that the Respondents had continued to violate section 32 of the Act after having been warned by him to discontinue such violations. Section 32 provides as follows:

"SEC. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or

*"SEC. 30. Whenever, in the opinion of the Comptroller of the Currency, any directors or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a state member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System in its discretion may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: Provided, That such order and the findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than 5 years, or both, in the discretion of the court." (U. S. Code, title 12, sec. 77.)

other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited
13 classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments." (U. S. Code, title 12, sec. 78.)

The Comptroller's certificate further recited such additional facts as tended to show, if true, that Respondents while serving as directors of the Bank during the years 1942, 1943 and 1944 were during such time employees of an investment firm primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities.

Accordingly, the Board on August 9, 1944, issued an order notifying Respondents to appear and to show cause why they should not be removed from office as directors of the Bank. A Hearing Officer was appointed by the Board and thereafter hearings were conducted by such Officer at the Federal Reserve Bank of New York during October and December 1944. Respondents were represented in these hearings by counsel and were present at most of the hearings.

Thereafter, on February 15, 1945, the Hearing Officer certified to this Board the transcript of the proceedings conducted before him, together with his recommended findings of fact. He also forwarded certain suggested corrections to the record, exceptions to his tentative findings and certain motions, and a brief, all filed with him on behalf of Respondents.

On March 12, 1945, the Respondents, with their counsel, appeared in person before the Board in Washington, D. C., and their counsel argued the matter orally before the Board.

The Board has considered all of the record, as well as the brief and oral arguments made on behalf of the Respondents. The motions filed on behalf of the Respondents will be dealt with in the conclusions of law.

Findings of Fact

There is no dispute as to the essential facts. Respondent
14 Fayerweather has been a director of the Bank since January 13, 1925, while Respondent Agnew has been a director of the Bank since November 27, 1934. The Bank itself is a national banking association and a member of the Federal Reserve System. Both Respondents were reelected directors at the annual meetings of the shareholders of the Bank held

on January 13, 1942, January 12, 1943, and January 11, 1944. Following these elections, they took the directors' oaths prescribed by section 5147 of the Revised Statutes as amended; and these oaths were duly filed in the office of the Comptroller of the Currency. Total holdings of stock of the Bank by the Respondents and by their families approximate only about 1,000 shares out of a total of 12,000 shares outstanding. Mr. Fayerweather has been in the securities business since 1920 and both he and Mr. Agnew have been employed by the firm of Eastman, Dillon & Co. since March 1941 and are employed at the office of the latter in Paterson, New Jersey.

Eastman, Dillon & Co., a partnership which has its main office in New York, N. Y., advertises and holds itself out to the public as being engaged in the business described in its advertisements as follows:

"Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities"

In the 1943 edition of "Security Dealers of North America," published by Herbert D. Siebert & Co., New York, N. Y., the Firm's business is described as follows; and this is an accurate description of the general nature of its business:

"Underwriters, Participating Distributors & Dealers in Municipal & General Market Issues; Stock Brokers."

The Firm does practically everything in relation to the handling of securities (other than United States Government Securities), acting as an agent and acting as a principal, wholesale and retail, executing orders on the Stock Exchange, the Curb Exchange, and the Philadelphia Exchange. Those different activities vary in volume. The Firm endeavors to transact business the way its customers desire and to transact the type of business its customers desire. Sometimes its customers prefer to do business in stocks and sometimes in bonds. Sometimes they buy or sell in large lots and sometimes in small lots.

The Firm does business on a fiscal year basis. Its year ends on the last day of February. For the fiscal year ending February 28, 1943, its gross income from the "underwriting field" (meaning the issue, flotation, underwriting, public sale or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds or other similar securities) amounted to 26% of its gross income from all sources; and its gross income from the brokerage business (acting as agent in buying and selling for others) amounted to 42% of its gross income from all sources. For the fiscal year ending February 29, 1944, its gross income from the "underwriting field" amounted to 32% of its gross income from all sources; and its gross income from the brokerage business

amounted to 47% of its gross income from all sources. For the period March 1, 1944 to July 31, 1944, its gross income from the "underwriting field" amounted to 39% of its gross income from all sources; and its gross income from the brokerage business amounted to 40% of its gross income from all sources. However, the figures for the period March 1 to July 31 may not be a fair criterion for a year's business because the Firm's business varies from time to time and sometimes the months of March, April, May and June constitute the more active period of its business. During 1943, the proportion of its business represented by underwriting had been larger than during 1942, due to the decline in the amount of commissions from the brokerage business.

Considering the market value of the securities which were bought and sold by the Firm as agent as well as those bought and sold by it for its own account during an indefinite period prior to September 20, 1943, that part lying within "the underwriting field" would represent about 15% of the total market value. If one were to classify the total number of transactions during an indefinite period prior to September 20, 1943, it would be found that those in "the underwriting field" would amount to a similar percentage (15%) of the total number.

16 During the year 1943, the Firm ranked ninth among 94 leading investment bankers of the country with respect to its total participations in underwritings of bonds. Excluding municipal and railroad bonds, its participations in underwritings during 1943 amounted to $14,657,000. For a period during 1943 it ranked first among the underwriters. The Firm gets all the underwriting business that it can.

The Firm does no business with the Bank and has not done so since the Fall of 1941, when the Bank disposed of all of its bonds, other than United States Government bonds. The Firm does not deal in United States Government bonds. Since October 1941, Respondents have done no business with the Bank other than a strictly commission business with its customers.

During 1943 the fact of Respondents' dual association with the Bank and with Eastman, Dillon & Co. came to the attention of the Federal Reserve Bank of New York. Thereupon the matter was brought to the attention of the President of the Paterson National Bank. The attention of the latter was directed to the provisions of Section 32 of the Banking Act of 1933, as amended, Regulation R of the Board and the interpretations which had been placed upon the law and regulation by the Board in previous cases. He was further advised that in the opinion of the Federal Reserve Bank of New York Respondents could not lawfully continue as directors of the Bank while associated with Eastman, Dillon & Co.

There followed a lengthy correspondence on this subject until,

on May 18, 1944 (Respondents meanwhile having been reelected as directors of the Bank on January 11, 1944), the Comptroller of the Currency, by registered letter sent to each of the Respondents, advised them that in the opinion of the Comptroller of the Currency each was violating section 32 of the Act by serving as a director of the Bank while being at the same time an employee of Eastman, Dillon & Co.; and each was warned by the Comptroller to discontinue such violation of law. Notwithstanding this warning, Respondents continued to serve as directors of the Bank and also continued as employees of Eastman, Dillon & Co.

17 Conclusions of Law

There are two preliminary matters to be disposed of before turning to the principal issue involved in this proceeding. The first of these is a motion filed on behalf of the Respondents challenging the right of any person or persons to conduct the hearings and to receive evidence on behalf of the Board. Respondents contend that because the statute provides for a notice "to appear before such Board" all of the evidence must be taken in the Board's presence. It is sufficient to say that this hearing is before the Board and that it is well settled that the requirements of due process do not preclude practical administrative procedure, including the use of examiners or hearing officers to take the evidence to be considered by the authority making the determination. Morgan v. United States, 298 U. S. 468, 481; 304 U. S. 1, 21. The significant words of the statute in this connection are those which authorize the Board to act if, "after granting the accused director or officer a reasonable opportunity to be heard," it finds that he has continued to violate the law after warning. We emphasize again that we have considered the record as presented to the Board in its entirety and that our decision is predicated upon such consideration.

In this connection, the "Suggested Corrections to the Record" filed by the Respondents have been considered by the Board, and and the Record will be regarded as having been corrected accordingly. Also, the "Exceptions to Tentative Findings of Fact" have been considered, but it appears that both points raised therein were taken care of by the Hearing Officer in preparing his "Recommended Findings".

The second preliminary matter is a motion challenging the sufficiency of the certificate of the Comptroller of the Currency. We do not deem this a substantial objection. The certificate taken as a whole recites facts which, assuming their truth, state a violation of section 32 of the Banking Act of 1933 and a continuation thereof after a warning to discontinue as provided under section 30 of the Act.

These motions and the motion to dismiss addressed to the sufficiency of the evidence are all overruled.

18 The only substantial question, and the one upon which this matter turns, is whether Eastman, Dillon & Co., was, at the times stated in the certificate of the Comptroller of the Currency, "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities" within the meaning of section 32 of the Act. The Respondents contend that the use of the word "primarily" limits the application of the statute to those cases in which the underwriting business of the securities firm is first in volume in comparison with any other business or businesses in which it engages. It is true that, under one of its definitions, the word has a quantitative meaning. This, however, is not the only accepted meaning. The word "primary" is frequently used in another sense. For instance, red is one of the "primary" colors but it is not the only primary color; Saturn is one of the "primary" planets but it is neither the only nor the largest one. Standard dictionaries cite as examples of the use of the word in the latter sense expressions such as "the primary causes of a war" and "a matter of primary importance". (Merriam-Webster International Dictionary and Webster's Collegiate Dictionary). The Board is mindful of the rules of statutory construction that, while all of the words of a statute should be considered as having meaning, where a word used in a statute is susceptible of several meanings, that meaning should be adopted which best accords with the intention of the legislature in enacting the statute. Also, a word used in a statute should not be construed to produce an absurd consequence if it is susceptible of another construction in accord with the legislative intent. Section 32 is one of several measures enacted in 1933 designed to divorce commercial banking from investment banking. To say that a securities firm ranking ninth among the leading investment bankers of the country with respect to its total participations in underwritings of bonds, and for a period ranking first, should be held to be beyond the scope of the statute is to say that Congress enacted a statute with the intention that it would apply to no one.

19 The construction for which the Respondents contend, which is based on one accepted definition of the word "primarily", would lead to that result. The other construction, which is based on another accepted definition of that word, would conform to the Congressional intention as established by the legislative history. Accordingly, the Board finds as a matter of law that Eastman, Dillon & Co., at the times stated, was "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at whole-

sale or retail, or through syndicate participation, of stocks, bonds, or other similar securities".

Respondents also argued that since the Bank had no dealings with Eastman, Dillon & Co., the evil at which the law is aimed is not present in this case, and that therefore the Respondents are not prohibited from serving in their dual relationships. The argument ignores the words of the statute, which provides that "no partner or employee" of any firm primarily engaged in underwriting or distributing securities "shall serve at the same time as an officer, director or employee of any member bank". No mention is made of transactions—or the absence of transactions—between the firm and the Bank. As originally enacted, the statute authorized the Board to issue individual permits, but the statute was amended in 1935 so as to revoke this power, and the Board is now authorized to make exceptions only "by general regulations". The Board under this authorization has made only one exception in its regulations on this subject,* and that does not apply to the facts of the present case.

An order that the Respondents be removed from office as directors of The Paterson National Bank, Paterson, New Jersey, will issue.

By direction of the Board of Governors this 23rd day of March, A. D. 1945.

(S.) CHESTER MORRILL,
Secretary.

In the District Court of the United States
For the District of Columbia

[Title omitted.]

Motion for writ of certiorari

Filed April 28, 1945

Come now the plaintiffs, by and through their attorneys, and move the Court for a writ of certiorari directed to Board of

*The exception is in the following provision in section 2 of the Board's Regulation R, entitled "Relationship with Dealers in Securities under Section 32 of the Banking Act of 1933":

"Any officer, director, or employee of any corporation or unincorporated association, any partner or employee of any partnership, or any individual, not engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of any stocks, bonds, or other similar securities except bonds, notes, certificates of indebtedness, and Treasury bills of the United States, obligations fully guaranteed both as to principal and interest by the United States, debentures issued by Federal Intermediate Credit banks, bonds issued by Federal Land banks, and general obligations of Territories, dependencies and insular possessions of the United States, may be at the same time an officer, director, or employee of any member bank of the Federal Reserve System, except when otherwise prohibited."

Governors of the Federal Reserve System, commanding it to send up the complete record and proceedings in the matter of
21 John Agnew and F. O. Fayerweather, directors The Paterson National Bank, Paterson, New Jersey, to the end that upon consideration of the record and proceedings the order of said Board be held to be in excess of its jurisdiction and null and void.

HUGH H. OBEAR,
Attorney for Plaintiffs,
822 Southern Building, Washington, D. C.

DAVIES & DAVIES,
Paterson National Bank Building, Paterson, New Jersey,
DOUGLAS, OBEAR & CAMPBELL,
822 Southern Building, Washington, D. C.,
Of Counsel.

Served a Copy of the Within Above Motion Notice on within named defendant Board of Governors of Federal Reserve System by serving George B. Vest, General Counsel, personally 4-30-45 C. Michael Kearney, U. S. Marshal in and for the District of Columbia, by T. R. East, Deputy U. S. Marshal. ——. U. S. Marshal's Fee, $2.00.

In the District Court of the United States
For the District of Columbia

[Title omitted.]

22 *Motion to dismiss*

Filed May 4, 1945

Comes now the Board of Governors of the Federal Reserve System by its attorneys undersigned and moves this Honorable Court to dismiss the complaint herein on the following grounds:

1. This Court is without jurisdiction to entertain a suit against the Board of Governors of the Federal Reserve System, which is an instrumentality of the United States and which has not consented nor can it consent to be sued herein.

2. This Court is without jurisdiction to issue a writ of certiorari for the purpose outlined in the bill of complaint herein.

3. The complaint fails to state any claim upon which any relief can be granted.

EDWARD M. CURRAN,
United States Attorney for the District of Columbia,
Court House, Washington, D. C.,
GEORGE B. VEST,
J. LEONARD TOWNSEND,
Board of Governors of the Federal Reserve System,
Washington, D. C.,
Counsel for Defendant.

Service to the within motion acknowledged.

HUGH H. OBEAR,
822 Southern Building, Washington, D. C.,
Counsel for Plaintiffs.

* * * * *

23 In the District Court of the United States for the District of Columbia

[Title omitted.]

Amended complaint for writ of certiorari or, in alternative, for an injunction

Filed May 15, 1945

1. The defendant, Board of Governors of the Federal Reserve System, is an administrative and quasi-judicial tribunal, having its principal office in the City of Washington, District of Columbia, and is organized under and by virtue of the Act of December 23, 1913, Ch. 6, 38 Stat. p. 251, known as the "Federal Reserve Act," and certain acts amendatory thereof. The defendants, Marriner S. Eccles, Ronald Ransom, M. S. Szymczak, John K. McKee, Ernest G. Draper, and Rudolph M. Evans are members of the Board of Governors of the Federal Reserve System.

2–8. Plaintiffs adopt the allegations of paragraphs 2 to 8, inclusive, of the original complaint filed herein.

9. Plaintiffs aver that they were and are prejudiced by the said order of the said Board of Governors entered the 23rd day of March, 1945, wherein and whereby they were removed from their said offices as directors of the Paterson National Bank of Paterson, New Jersey, and deprived of the same and of the emoluments thereof, all without due process of law guaranteed them by the Fifth Amendment of the Constitution of the United States.

10. Plaintiffs aver that the actions of the defendant Board of Governors hereinabove referred to have been participated in
24 by the individual defendants as members of such Board of Governors, and that such actions on the part of the indi-

vidual defendants were wholly without right or authority in law and in excess of their power and authority as members of the defendant Board of Governors.

11. Plaintiffs are in doubt as to whether their remedy for the aforesaid grievances is by way of writ of certiorari to the defendant Board of Governors or by way of mandatory injunction against the said Board or the individual members thereof.

Wherefore, the Premises Considered, plaintiffs pray:

1. That a writ of certiorari may be awarded them directed to the Board of Governors of the Federal Reserve System commanding it to certify to this Honorable Court the complete record and proceedings in the matter hereinbefore recited to the end that this Court may review the same and consider and determine whether the said Board of Governors had jurisdiction and authority to make and issue the aforesaid order dated the 23rd day of March, 1945, and that upon such consideration of the record and proceedings and order, dated the 23rd day of March, 1945, this Court may decree the same to be beyond the scope and power of the said Board of Governors and in excess of its jurisdiction, and null and void.

2. That in the alternative, this Court may enter a mandatory injunction against the defendant Board of Governors and the individual defendants herein named, commanding said defendants and each of them to vacate and set aside their purported order entered on the 23rd day of March, 1945, and hereinabove referred to.

3. That plaintiffs may have such other, further and alternative relief as to the court may seem meet and proper.

HUGH H. OBEAR,
822 Southern Building, Washington, D. C.,
Attorney for Plaintiff.

DAVIES & DAVIES,
Paterson National Bank Building,
Paterson, New Jersey.

25 DOUGLAS, OBEAR & CAMPBELL,
822 Southern Building, Washington, D. C.,
Of Counsel.

In the District Court of the United States

For the District of Columbia

[Title omitted.]

Motion of the individual defendants to dismiss

Filed June 9, 1945

Come now the defendants, Marriner S. Eccles, Ronald Ransom, M. S. Szymczak, John K. McKee, Ernest G. Draper and Rudolph

M. Evans, by their attorneys undersigned and move this Honorable Court to dismiss the amended complaint herein on the following grounds:

1. The Court lacks jurisdiction over the subject matter of this suit because the suit is in effect one seeking to interfere with and control the Board of Governors of the Federal Reserve System, an agency of the United States, in the performance of its lawful duties under the laws of the United States; such suit, therefore, is a suit against the United States which is not and cannot be made a part hereto.

2. The amended complaint otherwise fails to state a claim upon which any relief can be granted.

EDWARD M. CURRAN,
United States Attorney for the District of Columbia,
Court House, Washington, D. C.,
26 GEORGE B. VEST,
J. LEONARD TOWNSEND,
Board of Governors of the Federal Reserve System,
Washington, D. C.
Counsel for Defendants.

Service of the within motion acknowledged.
HUGH H. OBEAR,
822 Southern Building, Washington, D. C.
Counsel for Plaintiffs.

In the District Court of the United States

For the District of Columbia

Civil Action No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, PLAINTIFFS

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, WASHINGTON, D. C.; MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCZAK, JOHN K. MCKEE, ERNEST G. DRAPER, RUDOLPH M. EVANS, DEFENDANTS

Judgment

(Filed June 25, 1945)

The above-entitled matter came on to be heard by the Court upon the complaint, the amended complaint, and motions to dis-

miss filed by the defendant, Board of Governors of the Federal Reserve System, and the individual defendants, respectively. Upon consideration of the oral argument had upon said motions and the briefs filed herein by the parties, it is by the Court this 25th day of June, 1945,

27 Adjudged, Ordered and Decreed, That the complaint and the amended complaint be and the same are hereby dismissed.

MATTHEW F. MCGUIRE,
Justice.

Approved as to form.
HUGH H. OBEAR,
Counsel for Plaintiffs.

* * * * *

28 In United States Court of Appeals, District of Columbia

Before Honorable HENRY W. EDGERTON, WILBUR K. MILLER, and E. BARRETT PRETTYMAN, Associate Justices.

No. 9102, October Term, 1945

JOHN AGNEW ET AL., APPELLANTS

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL., APPELLEES

Minute entry

November 14, 1945

Argument commenced by Mr. Hugh H. Obear, attorney for appellants, continued by Mr. J. Leonard Townsend, attorney for appellees, and concluded by Mr. Hugh H. Obear.

29 In United States Court of Appeals, District of Columbia

No. 9102

JOHN AGNEW, F. O. FAYERWEATHER, APPELLANTS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Argued November 14, 1945. Decided February 13, 1946

Mr. Hugh H. Obear for appellants.

Mr. J. Leonard Townsend, Assistant General Attorney, Board of Governors of the Federal Reserve System, with whom Mr. Edward M. Curran, United States Attorney, was on the brief, for appellees.

Before EDGERTON, WILBUR K. MILLER and PRETTYMAN, JJ.

Opinion

PRETTYMAN, J.: Appellants sought from the District Court a writ of certiorari to the Board of Governors of the Federal Reserve System (to which we shall refer as the Board) or, in the alternative, a mandatory injunction, seeking review of an order of the Board which had removed them from office as directors of the Paterson National Bank of Paterson, New Jersey. The District Court dismissed the complaint.

The substantive controversy revolves around the meaning of the words "primarily engaged" in the following statute:

"No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments."[1]

30 The Board is empowered,[2] upon certification by the

[1] Act of June 16, 1933, c. 89, § 32, 48 Stat. 194 (as amended Aug. 23, 1935, c. 614, § 307, 49 Stat. 709), 12 U. S. C. A. § 78.

[2] By Section 30 of the Act (12 U. S. C. A. § 77).

Comptroller of the Currency, to remove from office a director of a member bank if it finds that he has continued to "violate any law" relating to the bank, after having been warned by the Comptroller. A director who participates in the management of a bank after having thus been ordered removed from office, is liable to a fine of not more than $5,000 or imprisonment for not more than five years, or both.

Appellants were directors of the Paterson National Bank, one since November 27, 1934, and the other since January 13, 1925. Since March, 1941, they have been employees of Eastman, Dillon & Co., a New York concern engaged in the securities business.

After certification by the Comptroller of the Currency and after hearing, the Board made the following findings of fact in respect to Eastman, Dillion & Co.:

The company advertises its business as "Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities." For the fiscal year 1943, its gross income from the "underwriting field" (meaning the issue, flotation, underwriting, public sale or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds or other similar securities)[3] amounted to 26 per cent of its gross income from all sources; and its gross income from the brokerage business (acting as agent in buying and selling for others) amounted to 42 per cent of its gross income from all sources. For the fiscal year ending February 29, 1944, its gross income from the "underwriting field" amounted to 32 per cent of its gross income from all sources; and its gross income from the brokerage business amounted to 47 per cent of its gross income from all sources. Considering the market value of the securities which were bought and sold by the firm as agent as well as those bought and sold by it for its own account during an indefinite period prior to September 20, 1943, that part lying within the "underwriting field" would represent about 15 per cent of the total market value. If one were to classify the total number of transactions during an indefinite period prior to September 20, 1943, it would be found that those in the "underwriting field" would amount to a similar percentage (15 per cent) of the total number. During the year 1943, the firm ranked ninth among 94 leading investment bankers of the country with respect to its total participation in underwritings of bonds. Excluding municipal and railroad bonds, its participations in underwritings during 1943 amounted to $14,657,000. For a period during 1943 it ranked first among the underwriters.

Upon the basis of the foregoing findings of fact, the Board reached the following "Conclusions of Law":

[3] The Board thus used the term "underwriting" to mean the entire operation described in the statute. We shall so use it.

"The only substantial question, and the one upon which this matter turns, is whether Eastman, Dillon & Co. was, at the times stated in the certificate of the Comptroller of the Currency, 'primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities' within the meaning of section 32 of the Act. The Respondents contend that the use of the word 'primarily' limits the application of the statute to those cases in which the underwriting business of the securities firm is first in volume in comparison with any other business or businesses in which it engages. It is true that, under one of its definitions, the word has a quantitative meaning. This, however, is not the only accepted meaning. The word 'primary' is frequently used in another sense. For instance, red is one of the 'primary' colors but it is not the only primary color; Saturn is one of the 'primary' planets but it is neither the only nor the largest one. Standard dictionaries cite as examples of the use of the word in the latter sense expressions such as 'the primary causes of a war' and 'a matter of primary importance.' (Merriam-Webster International Dictionary and Webster's Collegiate Dictionary.) The Board is mindful of the rules of statutory construction that, while all of the words of a statute should be considered as having meaning, where a word used in a statute is susceptible of several meanings, that meaning should be adopted which best accords with the intention of the legislature in enacting the statute. Also, a word used in a statute should not be construed to produce an absurd consequence if it is susceptible of another construction in accord with the legislative intent. Section 32 is one of several measures enacted in 1933 designed to divorce commercial banking from investment banking. To say that a securities firm ranking ninth among the leading investment bankers of the country with respect to its total participations in underwritings of bonds, and for a period ranking first, should be held to be beyond the scope of the statute is to say that Congress enacted a statute with the intention that it would apply to no one. The construction for which the Respondents contend, which is based on one accepted definition of the word 'primarily,' would lead to that result. The other construction, which is based on another accepted definition of that word, would conform to the Congressional intention as established by the legislative history. Accordingly, the Board finds as a matter of law that Eastman, Dillon & Co., at the times stated, was 'primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities.'"

31

In general terms the questions presented are: Had the District

Court jurisdiction? If so, what power has the court? Should the Board's interpretation of the statute stand?

It is important that the first two questions be more precisely defined. Generalities as to judicial review serve to confuse rather than to clarify. Three features of the case at bar delimit its questions of jurisdiction and of power. First, the statute involved is a general prohibition directed to all persons whatsoever. It forbids the persons described from being directors of a member bank. The authority of the Board is statutory and extends as far as, but no further than, the acts prohibited by the statute itself. Second, the Board seeks to determine the meaning of the statute as a matter of law; it does not present as the determinative premise
32 of its order a finding of fact that Eastman, Dillon & Co. was primarily engaged in underwriting. It is quite clear and commendably candid about its action and its objective. The facts as to Eastman, Dillon & Co. are the material from which the ruling is fashioned, but the ruling itself is a statutory construction. Third, no statutory method of appeal exists and the persons involved must, in order to test their rights, either seek the process of injunction or submit to criminal prosecution. The order of the Board is a final order.

The question of jurisdiction, therefore, is: Where an administrative agency issues a final order affecting the rights of individuals, which order is based upon a construction of a statute of general application, upon which construction the authority of the agency depends, and where, there being no statutory appeal, the individuals involved have no means of testing their rights except by civil action for injunction or by subjecting themselves to criminal liability by disobeying the order, has a Federal District Court jurisdiction to examine the order of the agency in a civil action for injunction? We think that it has.

We are not at this point considering the range of issues open to review, but merely whether, under the circumstances stated, resort can be had to the court at all. It is the right to challenge, not the extent of the remedial power, which must first be considered. We think it unnecessary to analyze the long line of cases dealing with the subject. Concurring in the St. Joseph Stock Yards case,[4] Mr. Justice Brandeis remarked, "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." The factors determinative of jurisdiction vel non were carefully analyzed by Mr. Justice Frankfurther in the Rochester Telephone case.[5] The Duquesne Ware-

[4] St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, 84, 56 S. Ct. 720, 80 L. Ed. 1033 (1936).
[5] Rochester Tel. Corp. v. U. S., 307 U. S. 125, 59 S. Ct. 754, 83 L. Ed. 1147 (1939).

house cases in this court [6] and in the Second Circuit [7] contain elaborate references to the authorities. In his dissent in the latter case, Judge Frank commented:

"I note in passing that in this Circuit we have not believed that the Supreme Court has suggested that we submit to 'administrative absolutism,' and consequently we have not hesitated to protect the legal rights of citizens when administrative officers have acted in excess of their statutory powers."

We think it unnecessary to review the cases at length.

The pending dispute is obviously a controversy and a case. The order complained of is not an interim administrative step. The requirements of equity are met by the fact that "disregard of the Commission's adverse action entails threat of oppressive
33 penalties." [8] The challenged power of the Board arises only when a director of a bank continues to violate a "law," in this case a statute. The content of the "law" is a subject for judicial determination. When presented under circumstances such as those just outlined, equity power exists to consider it.

A more difficult problem is the scope of the power of the court having jurisdiction. This question, like the question of jurisdiction, must be stated in terms of the case at bar, and not as an abstract generality. Most important of the limiting circumstances in this respect is that the Board has rested its order upon a construction of the statute as a matter of law. It did not evade or becloud the issue by merely making a finding of fact that, considering all the facts and circumstances, Eastman, Dillon & Co. was primarily engaged in underwriting, thus, seeking the protection of the doctrine of substantial evidence. Its objective is not the treatment of this concern alone. It seeks, quite properly, to establish the meaning of the statute which gives it power. With frankness and candor, which we think admirable, it poses the precise question to which it seeks an answer. Its course was to conclude that, as a matter of law, the phrase "primarily engaged" encompasses activities which, while not first or principal, are nevertheless substantial and important; and it then found that within the meaning thus established, Eastman, Dillon & Co. was primarily engaged in underwriting.

The ultimate question before us is whether the interpretation of the statute by the Board, as the definition of a standard to be applied generally, is correct. That question is not one of fact. It is not even what one learned author calls "a particularized conclu-

[6] Railroad Retirement Board v. Duquesne Warehouse Co., —— U. S. App. D. C. ——, 149 F. 2d 507 (1945).

[7] Duquesne Warehouse Co. v. Railroad Retirement Board, 148 F. 2d 473 (C. C. A. 2d, 1945).

[8] Language of Mr. Justice Frankfurter in the Rochester Telephone case, supra, note 5.

sion."[9] i. e., the exercise of judgment with respect to particular facts in determining the application of the statute.[10] The question is a matter of law.[11] We need not, therefore, attempt to thread our way through the confused and conflicting phases of the subject of judicial review which have puzzled both courts and students. On matters of law, unmixed, reviewing courts are free to substitute their own judgment for that of the administrator, although great weight must be given the administrative judgment. Consideration of a few recent decisions of the Supreme Court are sufficient to establish this conclusion. Dobson v. Commissioner, 320 U. S. 489, 64 S. Ct. 239, 88 L. Ed. 248 (1943);[12] Security Mills Co. v.
34 Comm'r, 321 U. S. 281, 64 S. Ct. 596, 88 L. Ed. 725 (1944); Medo Corp. v. Labor Board, 321 U. S. 678, 681–682, n. 1, 64 S. Ct. 830, 88 L. Ed. 1007 (1944).[13] For an earlier statement see Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 295 et seq., 42 S. Ct. 477, 66 L. Ed. 943 (1922).

We conclude as to the scope of the power of the court that the construction of the statute, for violation of which the Board is authorized to remove from office directors of a bank, is essentially a judicial function, but that the construction given the statute by the Board is entitled to great weight and respect.

The Board, in contending that the interpretation of this statute is within its unreviewable authority, relies upon Adams v. Nagle, 303 U. S. 532, 58 S. Ct. 687, 82 L. Ed. 999 (1938), as controlling. We find little similarity between that case and the case at bar. The opinion in that case, by Mr. Justice Roberts, dealt with the power of the Comptroller of the Currency to determine the sufficiency of the assets of a closed national bank as a prerequisite to assessment against the stockholders. The Court found that it had been invariable administrative practice, apparently since 1864, for the Comptroller to make such determinations, that prompt liquidation of such banks was desirable, that it would be intoler-

---

[9] Stern, Review of Findings of Administrators, Judges and Juries, 58 Harv. L. Rev. 70, 98.

[10] Board v. Hearst Publications, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944); South Chicago Co. v. Bassett, 309 U. S. 251, 60 S. Ct. 544, 84 L. Ed. 732 (1940); Parker v. Motor Boat Sales, 314 U. S. 244, 62 S. Ct. 221, 86 L. Ed. 184 (1941); Rochester Tel. Corp. v. U. S., supra note 5.

[11] "When the issue relates to the existence or nature of a general rule or standard which will be applicable to many cases, it is normally regarded as presenting a question of law." Stern, supra note 9, at 94.

[12] "It is contended that the applicable statutes and regulations properly interpreted forbid the method of calculation followed by the Tax Court. If this were true, the Tax Court's decision would not be 'in accordance with law' and the Court would be empowered to modify or reverse it. Whether it is true is a clear-cut question of law and is for decision by the courts." (Page 492.) "... when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand. In view of the division of functions between the Tax Court and reviewing courts it is of course the duty of the Tax Court to distinguish with clarity between what it finds as fact and what conclusion it reaches on the law. In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter." Id. at 502.

[13] See also Stern, supra note 9, at 97: "Such questions as to the test to be applied or the factors to be considered relevant or controlling are legal rather than factual. Though they must be determined initially by the lower court or administrative body, it is open to the reviewing court to set them aside whenever it disagrees with the decision below."

able if the Comptroller's decisions were open to attack collaterally, and that Congress had confided this function to the Comptroller. The Court held that the primary object of the statute was the protection of creditors, that reimbursement of the stockholders must await possible realization upon the assets, and that the remedy of the stockholder must await that event. None of these circumstances or considerations are in the present case.

We come now to consider the meaning of the statute. The facts in the case at bar are clear and clearly found. Thereby the alternative involved in the decision is made clear. Underwriting and brokerage, although both concerned with securities, are vastly different operations. By no quantitative test shown in this record can Eastman, Dillon & Co. be held to be principally or chiefly engaged in underwriting. Whether measured by volume, by income, or by number of transactions, its business is principally brokerage.[14] On the other hand, its underwriting business is substantial, and it ranks high in the relative dollar amount of such business among concerns in the United States. So, if substantial business other than the chief or principal business be considered, the company is within the statute. Thus, the question narrows to this: Does "primarily engaged" mean chiefly, or principally, engaged, or does it mean simply substantially, or importantly, engaged?

35 The Board says that the phrase "primarily engaged" has two possible meanings. Its premise is that the word "primary" has two possible meanings, one being a quantitative meaning and the other the meaning which the word has in expressions such as "the primary colors," "one of the primary planets," "the primary causes of war," and "a matter of primary importance." It says that the latter meaning accords with the legislative intent and, further, that the former leads to absurd results. It, therefore, adopts the latter meaning and concludes that, as a matter of law, Eastman, Dillon & Co. was primarily engaged in underwriting within the meaning of the statute.

It is true that the adjective "primary" has different shades of meaning, but always its basic idea is "first". It may refer to the first in order of time, and thus mean original or initial; or in order of importance, and thus mean chief or principal; or in order of derivation, and thus mean fundamental. Its synonyms are "prime" and "primeval". Its antonyms are "secondary" and "lesser". The difference which the Board senses, but does not state, is that "primary" is not restricted to the singular; it may refer to a plural. Thus, the primary colors are not one but several:

[14] These are all the quantitative measures mentioned or found by the Board, and the court is not permitted to speculate as to whether other measurements, such as net income, interest, effort or self-appraisal of importance, not found by the Board, might lead to a different result. We must assume that the Board mentioned all relevant factors, and certainly the validity of its conclusions must rest upon its findings and not upon speculations by the court as to other facts.

and so with the planets and the causes of war. An activity may be either a primary activity or the primary activity of a given person. The adverb "primarily" has similar shades of meaning. The Board's interpretation is, in effect, that "primarily engaged" as it occurs in this statute encompasses all the important activities of a concern; that it means "a" primary activity, not merely "the" primary activity.

But "primary" when applied to a single subject always means first, or chief, or principal. A concern's "primary activity" is never one of several; it is always the first, or chief, or principal, activity. And so it is with "primarily". When applied to a single activity, as it is to underwriting in the case at bar, it always means the first, or chief, or principal, activity. One would never say that a person is "primarily concerned" or "primarily interested" or "primarily engaged" in a specified single activity, if the idea sought to be conveyed was that the named activity was a lesser among several important activities. To say that such an expression conveys that idea is, we think, clearly erroneous.

In its brief, the Board epitomizes its position by saying, "Undoubtedly, then, Eastman, Dillion & Co. are 'fundamentally' or 'primarily' engaged in both the brokerage business and the underwriting business. To put it otherwise, underwriting is one of the businesses in which the firm is 'primarily' engaged." The latter sentence makes plain the error of law of the Board. It is true that the word "primary" may be applied to a plurality of items in order to distinguish that group from still others as secondary. But this does not answer the question which is posed by the statute. That problem is to ascertain whether the designated concern is primarily engaged in a single, named activity, i. e., underwriting. That problem is not solved by finding that the concern is primarily engaged in a group of several activities, in contradistinction to still other lesser activities, and then concluding that the concern is primarily engaged in each separate activity in the first group.

That process would lead to the conclusion that an activity
36 which, standing by itself, is by every standard less than another, is, nevertheless, primary. Such a conclusion is simply not true. The activity in which the concern is in fact secondarily engaged cannot be made its primary engagement by a process of reasoning which includes a fallacy of division.

The expression which Congress chose to use in this statute is an ordinary one, and in ordinary usage certainly refers to the chief or principal activity in which the company is engaged.[15] In deal-

[15] It is true, as the Board says in its brief, that some dictionaries give "fundamental" as a meaning of "primary"; and some also give "essential", which, however, the Board does not mention. But these words are not synonyms of "primary", and they overlap in meaning only when the implication of "fundamental" or "essential" is "first" or "principal". Other meanings of "fundamental" and "essential" cannot be ascribed to "primary" merely because the words are in part analogous. Certainly those words, in meanings other than "principal", are not apt as descriptive of business activity.

ing with practical matters, Congress does not consciously utilize obscure meanings of ordinary words to convey its intent. We should not impute to it either an ineptitude or a departure from its custom. So far as the ordinary and normal meaning of the words is concerned, the matter before us in clear and without difficulty. The sum of the matter is that we simply do not see how it can be said that a company is primarily engaged in underwriting, when underwriting is not, by any standard of measurement shown by the record, its chief or principal business. The Board strains at the language in order to achieve a result which it believes to be desirable.

It should be added that if Congress had meant to direct its prohibition to companies simply engaged in underwriting, or substantially engaged in underwriting i. e., to companies whose underwriting activities are secondary although important among several activities), it could have said so, as it has said many times in statutory enactments, and did in fact, as we shall see, so say in another section of this same Act.

But the Board says, quite properly, that legislative intent must govern statutory construction. It says that Congress intended to separate as far as possible national and member banks from securities dealers. In support, it points in its brief to the Senate Committee Report [16] on the bill which became the Act, and to Section 20 [17] and Section 21 [18] of the Act.

The section of the Committee Report upon which the Board relies reads:

"The committee has, therefore, determined to present proposed legislation aimed at the following objects:

"(1) To separate as far as possible national and member banks from affiliates of all kinds."

But the bill upon which the Committee was reporting contained a definition of "affiliates". When the Committee said "affiliates", it was using a term defined, not a generality. The bill, and the
37 consequent Act [19] defined an affiliate as any corporation,

[16] Sen. Rept. No. 77, 73rd Cong., 1st Sess. (1933).
[17] 48 Stat. 188, 12 U. S. C. A. § 377.
[18] 48 Stat. 189, 12 U. S. C. A. § 378.
[19] 48 Stat. 162, 12 U. S. C. A. § 221a. The Act said:
"As used in this chapter—
"
"(b) Except where otherwise specifically provided, the term 'affiliate' shall include any corporation, business trust, association, or other similar organization—
"(1) Of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or
"(2) Of which control is held (directly or indirectly, through stock ownership or in any other manner, by the shareholders of a member bank who own or control either a majority of the shares of such bank or more than 50 per centum of the number of shares voted for the election of directors of such bank at the preceding election, or by trustees for the benefit of the shareholders of any such bank; or
"(3) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one member bank."

etc., of which a member bank owns or controls either a majority of the voting shares or more than 50 per cent of the shares voted for the election of directors, or controls in any manner the election of a majority of directors; or of which control is held by shareholders of a member bank who own or control either a majority of the shares of the bank or more than 50 per cent of the shares voted for the election of directors of the bank; or of which a majority of its directors are directors of any one member bank. It is thus clear that the separation about which the Senate Committee was speaking in the Report relied on by the Board, was based upon a majority of shares or a majority of directors. It was not a complete dissolution of intermingled personnel; it was a dissolution of control only. It applied a quantitative test. Such were the "affiliates" to which the Senate Committee referred.

Moreover, the full text of the Committee Report does not bear out the meaning attached by the Board to the single sentence quoted. The context is:

"(a) The greatest of such dangers is seen in the growth of 'bank affiliates' which devote themselves in many cases to perilous underwriting operations, stock speculation, and maintaining a market for the banks' own stock often largely with the resources of the parent bank. This situation was never contemplated by the National Banking Act, and it would, therefore, appear that the affiliate system calls for the establishment of some legislative provisions designed to deal with the situation. It has been suggested from many quarters that the affiliate system be simply 'abolished.' This suggestion has much authority behind it, but, in addition to the manifest difficulty of enforcement, owing to the existence of well-known subterfuges to maintain control, there remains the question whether it would be of much real service so long as State legislation permits the growth of affiliates in connection with State banks and trust companies. The committee has, therefore, determined to present proposed legislation aimed at the following objects:

"(1) To separate as far as possible national and member banks from affiliates of all kinds.

38 "(2) To limit the amount of advances or loans which can be obtained by affiliates from the parent institutions with which they are connected.

"(3) To install a satisfactory examination of affiliates, working simultaneously with the present system of examination applicable to the parent banks." [20]

It is thus clear that the Committee, in this section of its Report, was concerned with the "bank affiliate" system, and, further, that it did not deem feasible the abolition of that system, dangerous

[20] *Supra*, note 16, at 10.

though it was said to be. That the legislation was not designed to accomplish the total abolition of even the affiliate system, and was addressed to a described evil, lends weight to the idea that in using the word "primarily" in its description of the prohibited relationship in Section 32 of the Act, Congress intended a restricted scope rather than totality in the prescribed separation.

Referring to Section 20 of the Act, the Board says, in its brief in this court:

"One of the principal sections designed to attain these purposes is section 20 of the Act, which provides that no member bank shall be affiliated 'in any manner' with any company 'engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.'"

But the Act does not read as the Board quotes it. It does not say "that no member bank shall be affiliated 'in any manner' with any company," etc. It says, "no member bank shall be affiliated in any manner *described in subsection (b) of section 221a of this title* with any corporation," etc. [Italics supplied.] The subsection mentioned is the definition of affiliates which we have just discussed. Thus, Section 20, in full text, prescribes dissolution of control only, and not the complete divorcement indicated by the partial quotation relied on by the Board. There is a vast difference.

Thus, it is plain that the Committee Report and the section of the Act from which the Board says we must derive the intent of Congress, do not prescribe the complete divorcement which the Board urges, but, quite the contrary, direct only a dissolution of control. In each provision of the definition of the prohibited affiliation, the line is drawn at the majority. Forty-nine per cent is permissible. Fifty-one per cent is prohibited. This is a quantitative test. If, as the Board says, we are to ascertain the intent of Congress by these references, we reach the clear conclusion that Congress intended to apply a quantitative test in its prohibition.

As to Section 21 of the Act, the Board says, in its brief in this court:

"Section 21 is complementary to section 20 and, among other things, prohibits any company which is engaged in the underwriting business from engaging 'at the same time to any extent whatever in the business of receiving deposits . . .'"

This section of the Act, prohibiting dealers in securities from engaging in the banking business, contains two expressions
39 pertinent to the present inquiry. Congress here used the phrase "engaged in the business"—not "primarily engaged," or "principally engaged," but simply "engaged". It added the emphatic phrase "to any extent whatever". These words prescribe

complete separation. When Congress meant complete separation, it said so, in this same Act, in unmistakable terms. It knew what terms to use, and used them.

We do not know why Congress, in separating member banks from outside interests, went only so far as to prohibit control. We do not know why it rested its prohibition upon the precise line of majority. We only know that it did so. And the fact that it did so seems to indicate that when it used the term "primarily engaged" in Section 32 of the Act, as contrasted with "engaged" and "engaged to any extent whatever" in Section 9, it had in mind a chief or principal business as measured by a quantitative test.

The Board says that if "primarily engaged" be construed to mean chiefly or principally engaged, absurd consequences would follow.[21] But we do not see that the consequences would be more absurd than those which ensue when Section 20 is applied. That a principality of business be requisite to a prohibition is no more absurd than that 51 per cent of stock ownership be requisite. The Board urges that to except one of the large and important concerns from this prohibition would be absurd. If the interrelationship were 49 per cent, it would be excepted from the prohibition of Section 20. One seems no more absurd than the other.

Research by the court has revealed one, and only one, previous reference by the Board to the provision here involved.[22] Our idea that the connection is too remote to be helpful seems to have been shared by the Board as that ruling was neither cited nor mentioned by it in brief or argument. On the other hand, the same phrase in other statutes has been repeatedly interpreted. For example, by Section 2 (a) (8) of the Public Utility Holding Company Act of 1935,[23] the Securities and Exchange Commission was authorized to declare a company without the Act if it found certain facts, including one that the company "is primarily engaged in one or more businesses other than the business of an electric utility company," and, in another clause, if it "is engaged primarily in manufacturing"; similar phrases appear in Section 3 (a) (3)[24] in relation to holding companies. The Commission has many times considered cases under the quoted language, and while we do not find that it ever defined the phrase, the findings of fact underlying its conclusions appear always to have been quantitative in nature and it uses the terms "principal business" and "principally engaged" as synonymous with "primarily engaged" (for example, The Cleveland-Cliffs Iron Company, 3 S. E. C. 326, 329, 330; Sloss-Sheffield Steel and Iron Company, 3 S. E. C. 460; Aluminum Com-

[21] The Board remarks in its conclusions that if "primarily" be held to mean principally, the statute would apply to no one. So far as appears, this observation is a speculative generality, which on the record cannot be treated as a finding of fact.
[22] 27 Fed. Reserve Bull. 399 (1941).
[23] 49 Stat. 804, 15 U. S. C. A. § 79b.
[24] 49 Stat. 810, 15 U. S. C. A. § 79c.

pany of America et al., 5 S. E. C. 640, 645; Fairbanks Morse & Co., 8 S. E. C. 360, 361). In the International Paper Company case, 9 S. E. C. 937, 940, the Commission said:

"After having given consideration to the circumstances surrounding the sales of electric energy by applicant, particularly that the energy sold is generated by owner or leased facilities devoted primarily to applicant's own use, as well as to the quantum and relative percentage of such sales, it appears to the Commission that International Paper Company is primarily engaged in one or more businesses other than the business of an electric utility company within the meaning of the Public Utility Holding Company Act of 1935, * * *"

The full phrase in the Public Utility Holding Company Act relating to holding companies is "only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company." The Commission held in the Cities Service Company case, 8 S. E. C. 318, 329, that the entire phrase must be read together and that while the scope of the qualification is explained by the latter portion of the language, the "'incidentally' phrase" must also be given effect.

"Primarily engaged" also appears in the Bankruptcy Act,[25] an exemption being granted a person "primarily bona fide personally engaged" in farming. The courts have had many cases involving this definition and uniformly recite quantitative tests.[26] They have used such expressions as "'Primarily' means basically, or in such manner as to be of first importance or of principal concern";[27] "The evidence does not support the conclusion that he was engaged chiefly in farming or tillage of the soil";[28] and "His farming activities did not, we think, ever become his primary business."[29]

It is of some importance, in referring to the Public Utility Holding Company Act and the Bankruptcy Act as throwing some light upon the terminology of the Banking Act, that the three Acts were before Congress at the same time. The first was approved August 26, 1935,[30] a reenactment of the second on May 15, 1935,[31] and the third on August 23, 1935.[32]

Further in respect to the Board's statement that "primarily" should not be construed to produce an absurd consequence (with

[25] 47 Stat. 1470, 11 U. S. C. A. § 203 (r).
[26] Williams v. Great Southern Life Ins. Co., 124 F. 2d 38 (C. C. A. 5th, 1941); Benitez v. Bank of Nova Scotia, 125 F. 2d 523 (C. C. A. 1st, 1942); Swift v. Mobley, 28 F. 2d 610 (C. C. A. 5th, 1928); Skinner v. Dingwell, 134 F. 2d 392 (C. C. A. 8th, 1943).
[27] Benitez v. Bank of Nova Scotia, supra note 26, at 531.
[28] Swift v. Mobley, supra note 26.
[29] Skinner v. Dingwell, supra note 26, at 393.
[30] 49 Stat. 804.
[31] 49 Stat. 246.
[32] 49 Stat. 704.

which statement we, of course, agree), in the light of the Senate Committee Report on the Banking Act, which we have discussed, we see a possible reason why Congress went only so far as to prohibit interrelationship between a bank and a security concern when the business of the latter is chiefly or principally underwriting. The evil at which this section of the statute was aimed was the possible selling of securities to the bank by its directors. Congress may well have considered that such practice is much more
41 likely to occur where underwriting is the principal or chief business of a concern, than where underwriting is a lesser or secondary interest. So it is not wholly unreasonable, in our view, that Congress laid the prohibition at that line.

At the same time, it may be, as the Board urges, that as a matter of policy, the national banking system should be divorced completely from concerns engaged in underwriting. But that question is not for the courts. Our function is merely to determine what Congress actually did in the statute before us. The Board could, and, if it so feels, should, present to the Congress its views on the problem of policy.

Collateral to the substantive question involved are the contentions of the Board that viewed as a suit against the Board, the action must fail because it is in effect a suit against the United States, which has not consented to be sued, and that the District Court is without jurisdiction to issue the writ of certiorari for the purposes sought.

The contention that the action for injunction is in effect a suit against the United States is without merit. Appellants seek to restrain an order of the Board on the ground that it is beyond the power of the Board. We need not pass upon the contention with respect to the jurisdiction of the court to issue a writ of certiorari, since we regard the action for injunction as the proper action.

Reversed.

Dissenting opinion

EDGERTON, J., dissenting:

I think the judgment should be affirmed. Eastman, Dillon & Co. are "Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities." It seems to me a paradox to say that these underwriters are not primarily engaged in underwriting: are they, then, only incidentally engaged in underwriting? Everyone agrees that underwriting is one of the Eastman firm's primary business and brokerage another. I think it is equally true that they are "primarily engaged" in each, and not merely in both, of these businesses.

I think Congress used the word "primarily" in a sense which includes "essentially" or "fundamentally" and is not limited to

"chiefly" or "principally".[1] These are all recognized senses of the word. The Oxford Dictionary includes "essentially", Webster's New International Dictionary includes "fundamentally", and Funk & Wagnalls' Standard Dictionary includes both "essentially" and "fundamentally", among the meanings of "primarily".

The court argues that we should not impute obscure meanings of ordinary words to Congress. Highly obscure and even wholly unheard-of meanings of ordinary words have sometimes been imputed to Congress in order to avoid a result which Congress did not intend. Thus in Trinity Church v. United States[2] the
42 Supreme Court, in order to shield a church from criminal liability, held that a clergyman does not perform any "labor or service". But there is nothing obscure or unusual about a meaning which is recognized, without the slightest suggestion of rarity or obsolescence, by most of the leading dictionaries. Unusual meanings of ordinary words, when they are recognized at all by these dictionaries, are marked "rare".[3] Meanings which are recognized without qualification are ordinary meanings. By ruling that "primarily" has no ordinary meaning except chiefly or principally, this court overrules the editors of Webster's, the Standard, and the Oxford dictionaries on a question of fact in their field. I think the court errs in deciding that meanings which three leading dictionaries regard as ordinary are in fact so rare that they cannot have been intended by Congress. The contradiction is not reduced by the court's suggestion that the words "essentially" and "fundamentally" add nothing to the sense of the definitions in which they occur.[4] A dictionary is not a book of synonyms. It purports to give meanings of terms, not to furnish alternative terms by which a given meaning may be expressed. "Essentially" and "fundamentally" mean what they say.

---

[1] Since the meaning which words convey necessarily varies with their context, interpretations of the words "primarily engaged" in other statutes are only slight evidence of their meaning here. For example, it is a far cry from the premise that the International Paper Co. is "only incidentally a holding company" and is "primarily engaged" in the paper business, within the meaning of the Public Utility Holding Company Act, to the conclusion that the Eastman firm of underwriters is only incidentally and not primarily engaged in the underwriting business within the meaning of the Act before us.

[2] 143 U. S. 457.

[3] The following quotations illustrate the way in which these dictionaries distinguish between ordinary and unusual meanings of ordinary words.

"Casual * * * 1. Happening or coming to pass without design, and without being foreseen or expected * * * 5. * * * Acting at random; undependable. Rare." Webster's New International Dictionary.

"Pleasant * * * 1. Giving or promoting pleasure * * * 2. Conducive to merriment or laughter; gay; lively; also (rarely), witty or facetious * * * 3. [Rare.] Excited with drink; alcoholically good-tempered." Funk & Wagnalls' New Standard Dictionary.

"Salt * * * 1. Impregnated with or containing salt; hence, having a taste like that of salt; saline * * * 5 Of speech, wit, etc.: Pungent, stinging. Now rare." Oxford Dictionary.

[4] The court's language is that essential and fundamental "are not synonymous of 'primary', and they overlap in meaning only when the implication of 'fundamental' or 'essential' is 'first' or 'principal'". This amounts to saying that "essential" and "fundamental" never "overlap in meaning" with "primary"; for the implication of "fundamental" or "essential" is never "first" or "principal". The two pairs of words convey wholly different ideas. The dictionaries include neither of the second pair in definitions of the first pair, and neither of the first pair in definitions of the second.

Choice between dictionary meaning is a normal process of statutory construction. It does not consist in deciding which meaning is the more usual. Its normal purpose and result are to give effect, as the Board did, to the probable intention of the legislature. This court's choice of a meaning for "primarily" is extraordinary in that its result is to defeat the intention of the legislature. It deprives § 32 of rational basis and of practical effect.

It is not disputed that what Congress aimed at in § 32 was the likelihood that if a bank director is interested, in the degree which Congress undertook to define as critical, in underwriting, the director may influence the bank or its customers to buy securities. This is made clear by the section itself.[5] In determining what interest in underwriting Congress undertook to define as critical, the question what interest might reasonably be thought criti-
43 cal is of great importance. Congress might reasonably think that if the director's employer is essentially engaged in underwriting, the director may be tempted to sell securities to the bank or its customers. Congress could not reasonably think that although the employer is so engaged, the fact that he is even more largely engaged in the related business of brokerage removes the temptation. The Board's interpretation attributes the rational theory, and this court's interpretation the irrational one, to Congress.

The Board says, and its statement is not disputed, that restricting the application of § 32 to firms whose underwriting business is first in volume would make this section "apply to no one". The court does not suggest that this result, which is no result at all, is the one which Congress intended. If the court's position is correct, the Act of Congress requires us to defeat the purpose of Congress. This seems to me another paradox.

The court argues that if Congress meant essentially it could have said essentially. It is equally true that if Congress meant principally it could have said principally. And the court overlooks the fact that in a different section of the same Act, and with regard to engaging in exactly the same group of activities, Congress did say principally. The "affiliate" section of the Act provides that a bank shall not, through control of stock or of directors, control an organization "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities."[6] But § 32, which defines the degree of engagement in the underwriting business that disqualifies a man as a bank direc-

[5] The section authorizes the Board to make regulations which permit men within the described class to serve as directors of a bank "when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments."

[6] 48 Stat. 188 §20; 12 U. S. C. § 377.

tor, rejects the phrase "engaged principally" which had been used in the affiliate section and uses instead the phrase "primarily engaged." It is reasonable and conventional to suppose that Congress made this change with a purpose. If so, Congress did not intend that "primarily engaged" should be interpreted as meaning "principally engaged."[7]

From the fact that Congress made a "majority" of one sort critical in sections[8] of the Act where it used the word "majority," the court infers that Congress meant to make a majority of another sort critical in § 32 where it did not use the word. To me the opposite inference, if either, would seem to be suggested. But the contexts are so different that no inference is suggested. They are so different that the court's argument comes to this; by recognizing that majorities of votes control corporations, Congress implied that a man's qualifications to serve as a bank director should turn upon a majority of the business activity in which he is engaged. The sections on which the court relies concern affiliates of banks. The purpose of Congress, in those sections, was to prevent banks from controlling underwriting corporations. Since control of a corporation depends upon control of a majority of directors, or ownership or control of a majority of voting shares or of shares voted, Congress made such majority control the measure of prohibited affiliation. In respect to the control of a corporation, 51 per cent of directors or of voting stock is a wholly different matter from 49 per cent. But in § 32 Congress did not aim at control either of underwriters by banks or of banks by underwriters;[9] and even if Congress had aimed at control, the question whether underwriting was or was not a majority of a firm's business would still have been irrelevant to its purpose. Section 32 is aimed only at the likelihood that a bank director who is interested in the underwriting business may exert influence upon his bank or its customers in favor of that business. The likelihood that he will do this does not depend in any degree upon the question whether the underwriting business is 51 per cent or 49 per cent of the business in which he is interested. The fact that Congress expressly treated a majority of voting power as critical where it makes sense to do so has no tendency to show that Congress meant

[7] The opinion of the court points out that in § 21 of the Act, in prohibiting underwriters from being engaged in banking, Congress used the phrase "engage . . . to any extent whatever." As the court points out, this makes it quite clear that when Congress, in § 32, prohibited bank directors from being "primarily engaged" in underwriting, Congress did not mean "engaged to any extent whatever." But no one contends that Congress meant that.

[8] 48 Stat. 162, 188; §§ 2 (b) (14), 20; 12 U. S. C. §§ 221a (b) (1), 377.

[9] The section makes no distinction between one director, who has no control, and a majority of directors.

If underwriting were 100 percent of the business of a firm, that fact would give its employee no more control of a bank of which he was a director than he would have if underwriting were a trifling and non-essential part of the firm's business, but it would subject him to more temptation to exert his influence in favor of his employer's underwriting operations. Accordingly § 32 is, as all agree, so drawn that the employee is disqualified to serve as a bank director in the first case but not in the second.

to treat a majority of business activity as critical where it would not make sense to do so.

The Board interpreted "primarily" as meaning "essentially" or the like. This interpretation is in accordance with the Board's rulings in other cases [10] and carries with it, as settled administrative practice always does, a strong presumption of correctness. If Congress intended to forbid this interpretation the Board made a mistake of law.[11] But it seems to me clear that this is not the case. Accordingly I do not undertake to say whether the record would support a finding that the Eastman firm are principally engaged in underwriting.[12]

45 In United States Court of Appeals for the District of Columbia

No. 9102—January Term, 1946

JOHN AGNEW ET AL., APPELLANTS

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Before EDGERTON, WILBUR K. MILLER, and PRETTYMAN, JJ.

Judgment

Filed February 13, 1946

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District

[10] 27 Federal Reserve Bulletin 399 (1941).

[11] If Congress did not intend to forbid that interpretation, it is immaterial whether Congress intended to require it or only to permit it. "Congress may have intended the agency to determine the 'sub-principle' within the statutory framework. The vital factor is the intention of Congress, not the generality of the administrative application." Stern, Review of Findings of Administrators, Judges and Juries, 58 Harv. L. Rev. 70, 107.

[12] They put "Underwriters" first in their advertising, and they get all the underwriting business they can. This suggests primacy of interest and effort, which promote sales. For all that appears, they may get a larger net income from underwriting than from brokerage. A man may be principally engaged in the practice of law even if his transactions on the stock exchange are more numerous and more profitable, and employ more capital, than his legal transactions.

Court for further proceedings not inconsistent with the opinion of this Court.

Per. Mr. Justice PRETTYMAN.

Dated February 13, 1946.
Dissenting opinion by Mr. Justice EDGERTON.

In United States Court of Appeals for the District of Columbia

[Title omitted.]

Designation of record

Filed February 26, 1946

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United
46 States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appendix to appellant's brief.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

(S.) Edward M. Curran,
EDWARD M. CURRAN,
United States Attorney for the District of Columbia,
Court House, Washington, D. C.

(S.) George B. Vest,
GEORGE B. VEST,

(S.) J. Leonard Townsend,
J. LEONARD TOWNSEND,
Board of Governors of the Federal Reserve System,
Washington, D. C.,
Counsel for Appellees.

Personal service of the within Designation of Record acknowledged this 26th day of February 1946.

(S.) Hugh H. Obear,
HUGH H. OBEAR,
Southern Building, Washington, D. C.,
Counsel for Appellants.

[Clerk's certificate to foregoing transcript omitted in printing.]

47 Supreme Court of the United States

Order allowing certiorari

Filed April 29, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

~~[Endorsement on cover:] File No. 51008. Virginia, Supreme Court of Appeals. Term No. 1305. Helen C. Calvert, Petitioner, vs. Charles Henry Smith, Charles Henry Smith, Jr., Fanny J. Smith, Auburn Gardens, Inc., et al. Petition for writ of certiorari and exhibit thereto. Filed June 5, 1946. Term No. 1305 O. T. 1945.~~

U. S. GOVERNMENT PRINTING OFFICE: 1946

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 19 1946
CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., *Petitioners,*

v.

JOHN AGNEW, F. O. FAYERWEATHER.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	4
Specification of errors to be urged	7
Reasons for granting the writ	7
Conclusion	12

CITATIONS.

CASES:

Adams v. Nagle, 303 U. S. 532	9
Apfel v. Mellon, 33 F. (2d) 805	9
Beal v. Missouri Pacific R. Co., 312 U. S. 45	10
Brunswick v. Elliott, 103 F. (2d) 746	
Bushnell v. Leland, 164 U. S. 684	9
Casey v. Galli, 94 U. S. 673	9
Cooper v. Woodin, 72 F. (2d) 179	9
Estep v. United States, No. 292, October Term 1945	9
Kennedy v. Gibson, 8 Wall. 498	9
Liberty National Bank v. McIntosh, 16 F. (2d) 906	9
Lucking v. Delano, 122 F. (2d) 21	9
Spielman Motor Sales Co. v. Dodge, 295 U. S. 89	10
Switchmen's Union v. National Mediation Board, 320 U. S. 297	9
United States Savings Bank v. Morgenthau, 85 F. (2d) 811	9

STATUTES:

Banking Act of 1933, 48 Stat. 193, U. S. C. Title 12, § 77	2
Banking Act of 1933, 48 Stat. 194, U. S. C. Title 12, § 78	4

MISCELLANEOUS:

Funk & Wagnall's Standard Dictionary	11
Webster's New International Dictionary	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., *Petitioners*,

v.

JOHN AGNEW, F. O. FAYERWEATHER.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

The Solicitor General, on behalf of the Board of Governors of the Federal Reserve System, Marriner S. Eccles, Chairman of said Board, Ronald Ransom, M. S. Szymczak, John K. McKee, Ernest G. Draper and Rudolph M. Evans, members of said Board, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on February 13, 1946.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 29-44) is not yet reported. No opinion was rendered in the United States District Court for the District of Columbia.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 13, 1946. (R. 45). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

(1) Is there a right of judicial review of the Board's action, under Section 30 of the Banking Act of 1933, as amended (12 U. S. C. § 77), in ordering respondents' removal as directors of The Paterson National Bank, Paterson, New Jersey?

(2) If so, did the Board err in holding that respondents were employed by a firm "primarily engaged" in the underwriting business, within the meaning of Section 32 of the Banking Act of 1933, as amended (12 U. S. C. § 78)?[1]

STATUTES INVOLVED.

Section 30 of the Banking Act of 1933, c. 89, 48 Stat. 162, 193, as amended (12 U. S. C. § 77), provides as follows:

"SEC. 30. Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a

[1] In case certiorari is granted petitioners reserve the right to argue that the suit is in substance one against the United States without the consent of Congress and that, even assuming reviewability otherwise, an injunction suit against the Board and its members is an inappropriate remedy.

national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided*, That such order and the findings of fact upon which it is based shall

not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court.

Section 32, as amended (12 U. S. C. § 78), provides:

SEC. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.

STATEMENT.

On March 23, 1945, the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board) issued an order removing respondents as directors of The Paterson National Bank, Paterson, New Jersey (hereinafter referred to as the Bank). The order was issued pursuant to authority conferred upon the Board by Section 30 of the Banking Act of 1933, 48 Stat. 193 (12 U. S. C. § 77), which provides, *inter alia*, that if, following a hearing, the Board finds that

an officer or director of a national bank has continued to violate any law relating to such bank after having been warned by the Comptroller of the Currency to discontinue such violation, the Board in its discretion may order that such officer or director be removed from office. (R. 9-10.) The finding upon which the Board's order in this case was made was that respondents had continued to violate Section 32 of the Banking Act of 1933, as amended (12 U. S. C. § 78), after having been warned by the Comptroller of the Currency to discontinue such violation (R. 16). Section 32 prohibits any officer, director or employee of any company, partnership or individual "primarily engaged" in the "underwriting" business from serving at the same time as an officer, director or employee of a national bank.

The facts respecting respondents' employer are not in dispute. The Board, after hearing, found that Eastman, Dillon & Co. is engaged in the general brokerage and securities business with its principal place of business in the City of New York; that it advertises and holds itself out to the public as "Underwriters, Distributors, Dealers and Brokers"; that it acts as broker or principal in executing orders on the New York Stock Exchange, the New York Curb Exchange and the Philadelphia Exchange; that it buys and sells securities as broker or principal at wholesale or retail; that over an indefinite period the transactions of the firm in the "underwriting" field amounted to about 15 per cent of the total market value of the securities that were bought and sold by the firm during the same period; that the total number of its underwriting transactions during the same period approximated a similar percentage (15%) of the total number of the firm's transactions; that for the fiscal year ending February 28, 1943, 26 per cent of the firm's gross income was derived from its

underwriting business, while 42 per cent of its gross income was derived from its brokerage business; that for the year ending February 29, 1944, 32 per cent of the firm's gross income was derived from its underwriting business, while 47 per cent of its gross income was derived from its brokerage business; that during 1943 the firm ranked ninth among 94 leading investment companies of the country with respect to its participations in bond underwritings; that for a period during such year it ranked first among such underwriters, excluding participations in municipal and railroad financings; and that the firm's participations in underwritings during 1943 amounted to $14,657,000. (R. 13-16.)

In their original complaint respondents named only the Board as defendant, praying that a writ of certiorari issue to the Board to determine whether the Board "had jurisdiction and authority" to make the removal order. (R. 7) They subsequently amended their complaint by adding the individual members of the Board as defendants and praying for alternative relief—asking either for the issuance of a writ of certiorari to the Board or for a mandatory injunction against the Board and its members requiring them "to vacate and set aside" the removal order. (R. 23-24)

Petitioners moved to dismiss the complaint on the grounds that the court lacked jurisdiction of the subject matter and that the complaint otherwise failed to sate a claim upon which relief could be granted (R. 25). The District Court dismissed the action, without opinion (R. 26-27). On appeal, the court below reversed, one judge dissenting (R. 29-44).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the District of Columbia erred:

(1) In holding that the District Court had jurisdiction in the circumstances of this case to review the correctness of the Board's interpretation of the words "primarily engaged" within the meaning of Section 32 of the Banking Act of 1933.

(2) In holding that such jurisdiction, if it existed, could be exercised in a suit for injunction against the Board and its members.

(3) In holding that the interpretation placed upon the words "primarily engaged" by the Board was erroneous.

(4) In failing to hold the suit one against the United States without the consent of Congress.

(5) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

This case presents, for the first time in the courts, an important question concerning the extent, if any, of judicial review of the administrative orders of the Board of Governors of the Federal Reserve System in administering the Federal banking statutes which are within the ambit of its jurisdiction. It also presents a question of considerable importance (also a matter of first impression in the courts) to the administration of Section 30 of the Banking Act of 1933.

(1) The first issue is whether respondents, notwithstanding the absence of any express statutory provision therefor, nonetheless are entitled to a right of judicial review of the Board's order removing them as directors

of the Bank. The court below answered this question in the affirmative, holding in substance that, inasmuch as the Board's order is predicated upon a construction of law, the content of that law is a matter for judicial determination. The effect of this ruling is to permit a public inquiry into the facts of each proceeding which may hereafter be held by the Board under Section 30. Such a result, if permitted to stand, may nullify the effectiveness of such proceedings in the bank supervisory scheme and seems contrary to the Congressional intent.

The bank-depositor relationship is delicately hinged upon the confidence of the public. Mere rumor can seriously impair that confidence. The Federal bank supervisory statutes are all geared to this truth. In none of them is there to be found any provisions for judicial review of the highly confidential orders and recommendations which grow out of the examining process. The same principle is involved in Section 30 proceedings, which permit removal of officers and directors upon findings either that particular directors have continued "unsafe and unsound practices" or that they have continued "to violate any law relating to such bank". The impact of a mere charge of the first type, if publicized, may be sufficient in a critical time to destroy a bank, and the reviewability of the two types of findings is obviously the same. Section 30 itself contains specific recognition of this danger. It provides that the Board's order of removal, together with the findings of fact upon which it is based "shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section".

The decision below encourages the publicity which the statute forbids.

We believe that in this statutory setting the absence of an express provision for judicial review should be read as manifesting a Congressional intent that there be no review. In *Estep* v. *United States*, No. 292, this Term, this Court recently stated that

> * * * Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297, 301. And except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses. * * *

Much more clearly here than in the Railway Labor Act has Congress indicated that administrative proceedings in the field of banking—and particularly under Section 30—should not be reviewable in court.[2] For here the explicit prohibition against disclosures of the Board's orders "to anyone", except in an enforcement proceeding,[3] would be meaningless if such matters could be submitted in all instances to the courts.

The Railway Labor Act contained no such express manifestations of legislative intention. Nevertheless, in *Switchmen's Union* v. *National Mediation Board*,

---

[2] The courts have also been reluctant to interfere with the administrative regulation of the banking system. *Adams* v. *Nagle*, 303 U. S. 532, 541, 542; *Kennedy* v. *Gibson*, 8 Wall. 498; *Casey* v. *Galli*, 94 U. S. 673; *Bushnell* v. *Leland*, 164 U. S. 684; *Apfel* v. *Mellon*, 33 F. 2d 805 (App. D. C.), certiorari denied, 280 U. S. 585; *Cooper* v. *Woodin*, 72 F. 2d 179 (App. D. C.); *United States Savings Bank* v. *Morgenthau*, 85 F. 2d 811 (App. D. C.), certiorari denied, 299 U. S. 605; *Lucking* v. *Delano*, 122 F. 2d 21 (App. D. C.), *Liberty National Bank* v. *McIntosh*, 16 F. 2d 906 (C. C. A. 4).

[3] It is unnecessary to determine in this case whether or to what extent a defendant in a criminal proceeding may assert that the Board has erred as a matter of law.

320 U. S. 297, the Court held that even an administrative decision on a question of law could not be reviewed on the ground that the statutory scheme showed that no judicial review was intended. There is, of course, no constitutional requirement that respondent obtain judicial review in equity, in advance of a criminal proceeding[1] to enforce the administrative order. *Cf. Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49, and cases cited. And respondent's retention of their bank directorships was clearly subject to any qualification, including any relating to the procedure for reviewability, which Congress may legitimately impose.

2. If the administrative decision is reviewable, the issue presented on the merits, which concerns the proper interpretation of the words "primarily engaged" as used in Section 32, is of great public importance in the administration of that section and Section 30.

Whether that phrase only applies to firms 51% of whose business is "underwriting" is a basic question of interpretation which will recur in the future from time to time as the boards of directors of national and member banks are changed or reconstituted.

The majority opinion held, in substance, that respondents' employers were not "primarily engaged" in the underwriting business because the volume of their brokerage business exceeded the volume of their underwriting business. The effect of this ruling would be to permit an employee of the largest—or the ninth largest—underwriting firm in the country to serve as a director of a national or member bank if 51% of the business of his employer was brokerage, and 49% underwriting. *Per contra*, an employee of a firm doing an insignifi-

[1] It is not alleged that criminal action has been threatened.

cant amount of underwriting could not serve as a bank director if the firm had even smaller quantities of other business. Such a construction, as emphasized in the dissenting opinion of Judge Edgerton, is "irrational" and does violence to the obvious Congressional intent to remove from bank directorates one, who by his affiliation with organizations essentially or fundamentally engaged in underwriting activities, may be tempted to "exert influence upon his bank or its customers in favor of that business". As Judge Edgerton further pointed out, whether a director may yield to such a temptation "does not depend in any degree upon the question whether the underwriting business is 51 per cent or 49 per cent of the business in which he is interested".

The Board's construction of the words "primarily engaged" gives effect to the general purpose of the statute emphasized above by Judge Edgerton. Further, it does so without distorting the literal meaning of the words. Although it is true that the word "primarily" may mean "firstly" or "chiefly", respectable dictionaries[5] also define it as meaning "essentially" and "fundamentally". These words connote substantiality, and not mere proportional priority. Clearly a word having slightly variant meanings should be given the only one which is consistent with the underlying purpose of the statute.

The Board's construction is not only in harmony with the objectives of the legislation, but is relatively definite in application, in contrast to the concept imposed by the court below. The latter would apply and reverse the application of the statute just as often as the percentage ratios beween the underwriting and other business of

[5] Funk & Wagnalls, New Standard Dictionary; Webster's New International Dictionary.

an employer fluctuated sufficiently to make first one and then another the greatest in volume. For that reason review of the decision is of additional importance to the administration of Sections 30 and 32. Clearly, if the decision below is permitted to stand it will frustrate the Congressional purpose by permitting large underwriting concerns to escape from the statutory prohibition.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

GEORGE B. VEST,
General Counsel,
Board of Governors,
Federal Reserve System.

March, 1946.

FILE COPY

OCT 29 1946
CHARLES ELMORE CROPLEY

No. 66

In the Supreme Court of the United States

OCTOBER TERM, 1946

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL., PETITIONERS

v.

JOHN AGNEW, F. O. FAYERWEATHER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	5
Specification of errors to be urged	7
Summary of argument	8
Argument:	
I. In the absence of a charge of fraud there is no review of the Board's orders issued under Section 30	11
A. The federal bank supervisory scheme	14
B. The judicial history of the federal banking statutes	20
C. The particular place of Section 30 in the federal bank supervisory scheme	26
D. The Administrative Procedure Act does not affect this case	32
II. The Board correctly interpreted the words "primarily engaged" as used in the statutes	36
Conclusion	59
Appendix	60

CITATIONS

CASES

Adams v. *Nagle*, 303 U. S. 532	8, 23
Aluminum Company of America, Matter of, 5 S. E. C. 640	54
Apfel v. *Mellon*, 33 F. 2d 805, certiorari denied, 280 U. S. 585	8, 21
Bailey v. *Tillinghast*, 99 Fed. 801	8, 21
Berryman v. *Board of Trustees of Whitman College*, 222 U. S. 334	53
Bushnell v. *Leland*, 164 U. S. 684	8, 21, 23
Cities Service Company, In the Matter of, 8 S. E. C. 318	55, 56
Cook County National Bank v. *United States*, 107 U. S. 445	15
Crane v. *Hahlo*, 258 U. S. 142	11
Estep v. *United States*, 327 U. S. 114	12, 13
First National Bank & Trust Company v. *Beach*, 301 U. S. 435	58
Great Northern Ry. Co. v. *United States*, 315 U. S. 262	40
Harper v. *Moran*, 76 F. 2d 980	23
International Paper Company, In the Matter of, 9 S. E. C. 937	55

718375—46——1

	Page
Johnson v. *Southern Pacific Company*, 196 U. S. 1	54
Kennedy v. *Gibson*, 8 Wall. 498	23
Korbly v. *Springfield Institution for Savings*, 245 U. S. 330	54
Liberty National Bank v. *McIntosh*, 16 F. 2d 906	9, 23
Logan v. *Davis*, 233 U. S. 613	40
National Bank v. *Case*, 99 U. S. 628	23
Norwegian Nitrogen Products Co. v. *United States*, 288 U. S. 294	41
Ohio v. *Akron Park District*, 281 U. S. 74	11
Piedmont & Northern Railway Co. v. *Interstate Commerce Commission*, 286 U. S. 299	53, 54
Raichle v. *Federal Reserve Bank*, 34 F. 2d 910	8, 21, 29
Reetz v. *Michigan*, 188 U. S. 505	11
Skidmore v. *Swift & Co.*, 323 U. S. 134	40
Sloss-Sheffield Steel & Iron Company, In the Matter of, 3 S. E. C. 460	55
Spokane & Inland Empire Railroad v. *United States*, 241 U. S. 344	53
Swift v. *Mobley*, 28 F. 2d 610	58
Switchmen's Union v. *National Mediation Board*, 320 U. S. 297	9, 12, 13, 20, 31
United States v. *American Trucking Associations*, 310 U. S. 534	38
United States v. *Heth*, 3 Cranch 399	33
United States v. *St. Louis, etc., Ry. Co.*, 270 U. S. 1	33
United States National Bank of La Grande v. *Pole*, 2 F. Supp. 153	29
United States Savings Bank v. *Morgenthau*, 85 F. 2d 811, certiorari denied, 299 U. S. 605, rehearing denied, 301 U. S. 666	23
Wannamaker v. *Edisto National Bank of Orangeburg*, 62 F. 2d 696	22
Washington National Bank of Tacoma v. *Eckels*, 57 Fed. 870	8, 23

STATUTES

Administrative Procedure Act (Public Law 404, c. 324, 79th Cong., 2d Sess.):	
Section 10	32, 33, 34, 35
Section 12	32, 33
Banking Act of 1933 (c. 89, 48 Stat. 162)	14
Section 2 (b) (12 U. S. C. § 221a)	46
Section 19 (12 U. S. C. § 61)	47, 48, 49
Section 20 (12 U. S. C. § 377)	45, 48, 49
Section 21 (12 U. S. C. § 378)	46
Section 30 (12 U. S. C. § 77)	2, 14, 19, 30
Section 32 (12 U. S. C. § 78)	4, 36
Banking Act of 1935, 49 Stat. 684	14, 42, 49, 54
Bankruptcy Act:	
Chapter X (11 U. S. C. § 501, et seq.)	57
Section 4 (11 U. S. C. § 22 (b))	57
Section 75 (r) (11 U. S. C. § 203 (r))	56, 57, 58
Clayton Act, 38 Stat. 730	18, 19
15 U. S. C. § 19	18
15 U. S. C. § 21	18

	Page
Federal Reserve Act:	
12 U. S. C. § 61	17
12 U. S. C. § 221	14
12 U. S. C. § 321	16
12 U. S. C. § 327	16
12 U. S. C. § 611	21
12 U. S. C. § 614	17
Federal Trade Commission Act, 15 U. S. C. § 45	20
Interstate Commerce Commission Act, 28 U. S. C. § 41 (28), §§ 43–46	20
National Bank Act:	
12 U. S. C. § 1	14
12 U. S. C. §§ 26, 27	16
12 U. S. C. §§ 33, 34a, 35	16
12 U. S. C. § 36	16
12 U. S. C. §§ 51a, 51b, 57, 58, 59	16
12 U. S. C. §§ 63, 191	16
12 U. S. C. § 84	16
12 U. S. C. § 92	16
12 U. S. C. § 132	17
12 U. S. C. § 192	17
Public Utility Holding Company Act (15 U. S. C. § 79):	
Section 2 (a) (3) (15 U. S. C. § 79b (a) (3))	52, 54
Section 3 (a) (3) (15 U. S. C. § 79c (a) (3))	52, 55

MISCELLANEOUS

	Page
75 Cong. Rec. 9890	28
75 Cong. Rec. 9912	49
Federal Reserve Bulletin, August 1946, p. 931	15
Funk & Wagnalls' New Standard Dictionary	39
H. Rep. No. 1980, 79th Cong., 2d Sess., pp. 41, 47	33, 35
Oxford Dictionary, The	39
S. 7, 79th Cong., 1st Sess	35
S. Rep. No. 77, 73rd Cong., 1st Sess	41, 42, 43
S. Rep. No. 752, 79th Cong., 1st Sess., pp. 30, 36, 37, 43	33, 35
Webster's New International Dictionary	39

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 66

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL., PETITIONERS

v.

JOHN AGNEW, F. O. FAYERWEATHER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals (R. 20–37) is reported at 153 F. (2d) 785. No opinion was rendered in the United States District Court for the District of Columbia.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1946 (R. 37–38). The petition for a writ of certiorari was filed on March 19, 1946, and granted on April 29, 1946 (R. 39). The jursdiction of this Court rests upon Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there is a right of judicial review of the action of the Board of Governors of the Federal Reserve System, taken under the provisions of Section 30 of the Banking Act of 1933, as amended (12 U. S. C. § 77), in ordering respondents' removal as directors of The Paterson National Bank, Paterson, New Jersey.

2. If so, whether the Board erred in holding that respondents were employed by a firm "primarily engaged" in the underwriting business, within the meaning of Section 32 of the Banking Act of 1933, as amended (12 U. S. C. § 78).

STATUTES INVOLVED

Section 30 of the Banking Act of 1933, c. 89, 48 Stat. 162, 193, as amended (12 U. S. C. § 77), provides as follows:

> SEC. 30. Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after

having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, where-

upon such director or officer shall cease to be a director or officer of such bank: *Provided,* That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court.

Section 32, as amended (12 U. S. C. § 78), provides:

SEC. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.

STATEMENT

On March 23, 1945, the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board) issued an order removing respondents as directors of The Paterson National Bank, Paterson, New Jersey (hereinafter referred to as the Bank) (R. 6–7). The order was issued pursuant to authority conferred upon the Board by Section 30 of the Banking Act of 1933, 48 Stat. 193 (12 U. S. C. § 77), which provides, *inter alia*, that if, following a hearing, the Board finds that an officer or director of a national bank has continued to engage in unsafe or unsound practices or to violate any law relating to such bank after having been warned by the Comptroller of the Currency to discontinue such practice or violation, the Board in its discretion may order that such officer or director be removed from office. The finding upon which the Board's order in this case was made was that respondents had continued to violate Section 32 of the Banking Act of 1933, as amended (12 U. S. C. § 78), after having been warned by the Comptroller of the Currency to discontinue such violation (R. 7–14). Section 32 prohibits any officer, director or employee of any company, partnership or individual "primarily engaged" in the "underwriting" business from serving at the same time as an officer, director or employee of a national bank.

Respondents were both directors of the Paterson

Bank and employees of Eastman, Dillon & Co. (R. 9–10). The facts respecting respondents' employer are not in dispute. The Board, after hearing, found that Eastman, Dillon & Co. is engaged in the general brokerage and securities business with its principal place of business in the City of New York; that it advertises and holds itself out to the public as "Underwriters, Distributors, Dealers and Brokers"; that it acts as broker or principal in executing orders on the New York Stock Exchange, the New York Curb Exchange and the Philadelphia Exchange; that it buys and sells securities as broker or principal at wholesale or retail; that over an indefinite period the transactions of the firm in the "underwriting" field amounted to about 15 per cent of the total market value of the securities that were bought and sold by the firm during the same period; that the total number of its underwriting transactions during the same period approximated a similar percentage (15%) of the total number of the firm's transactions; that for the fiscal year ending February 28, 1943, 26 per cent of the firm's gross income was derived from its underwriting business, while 42 per cent of its gross income was derived from its brokerage business; that for the year ending February 29, 1944, 32 per cent of the firm's gross income was derived from its underwriting business, while 47 per cent of its gross income was derived from its brokerage business; that during 1943 the firm ranked ninth among 94 lead-

ing investment companies of the country with respect to its participations in bond underwritings; that for a period during such year it ranked first among such underwriters, excluding participations in municipal and railroad financings; and that the firm's participations in underwritings during 1943 amounted to $14,657,000 (R. 9–11).

In their original complaint respondents named only the Board as defendant, praying that a writ of certiorari issue to the Board to determine whether the Board "had jurisdiction and authority" to make the removal order (R. 5). They subsequently amended their complaint by adding the individual members of the Board as defendants and praying for alternative relief—asking either for the issuance of a writ of certiorari to the Board or for a mandatory injunction against the Board and its members requiring them "to vacate and set aside" the removal order (R. 16–17).

Petitioners moved to dismiss the complaint on the grounds that the court lacked jurisdiction of the subject matter and that the complaint otherwise failed to state a claim upon which relief could be granted (R. 17–18). The District Court dismissed the action, without opinion (R. 18–19). On appeal, the court below reversed, one judge dissenting (R. 20–37).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that the District Court had jurisdiction in the circumstances of this case to review the correctness of the Board's interpretation of the words "primarily engaged" within the meaning of Section 32 of the Banking Act of 1933.

2. In holding that the interpretation placed upon the words "primarily engaged" by the Board was erroneous.

3. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

I

Absent a charge of fraud the Section 30 removal orders of the Board are not subject to judicial review in the courts. This is so because no express right of such review is provided in the statute, and all pertinent considerations point to the conclusion that Congress, in enacting Section 30, intended the Board's decisions thereunder to be final. The federal banking statutes generally provide no right of judicial review of the many administrative rulings which the banking agencies of the government are authorized to make, and the courts consistently have refused to engraft such a right upon those laws. Cf. *Adams* v. *Nagle*, 303 U. S. 532; *Bushnell* v. *Leland*, 164 U. S. 684; *Apfel* v. *Mellon*, 33 F. 2d 805 (App. D. C.), certiorari denied, 280 U. S. 585; *Raichle* v. *Federal Reserve Bank*, 34 F. 2d 910 (C. C. A. 2); *Bailey* v. *Tillinghast*, 99 Fed. 801 (C. C. A. 6); *Washington National Bank* v. *Eckels*, 57 Fed. 870 (C. C. W. D. Washington); *Liberty National*

Bank v. *McIntosh*, 16 F. 2d 906 (C. C. A. 4). Furthermore, the effectiveness of Section 30 proceedings would be nullified if a public inquiry into the reasons for the Board's order could be had in each case. The mere impact of a charge that a director or officer of a bank has been guilty of unsound, unsafe, or illegal practices might be sufficient in a critical time to destroy the bank itself. Congress recognized this danger and wrote a positive prohibition into Section 30 that the Board's removal order, and the findings upon which it is based, "shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section." In this statutory setting the absence of an express provision for judicial review should be read as manifesting a Congressional intent that there should be no review. Cf. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297.

The Administrative Procedure Act, passed after this Court granted certiorari, is inapplicable here, both because the statute was not meant to affect cases which have reached the appellate stage before its enactment, and because it does not alter the previous law as to judicial review in any respect material here.

II

The majority opinion below held that respondents' employer, while importantly and substan-

tially engaged in "underwriting" activities, is not "primarily engaged" therein because the volume of its "brokerage" business exceeded the volume of its "underwriting" business. Such an interpretation, described in the dissenting opinion of Judge Edgerton as "irrational", does violence to the obvious Congressional intent to remove from bank directorates those who, by their affiliation with organizations essentially or fundamentally engaged in underwriting activities, may be tempted to exert influence upon a bank or its customers in favor of that business. As Judge Edgerton further points out, whether a director may yield to such a temptation "does not depend in any degree upon the question whether the underwriting business is 51 per cent or 49 per cent of the business in which he is interested".

The Board's construction of the words "primarily engaged" gives effect to the general purpose of the statute stated above, and it does so without distorting the literal meaning of those words. Although it is true that the word "primarily" may mean "firstly" or "chiefly", it is also defined as "essentially" and "fundamentally". Clearly a word having slightly variant meanings should be given the only one which is consistent with the underlying purpose of the statute. On the other hand, if the majority decision below is permitted to stand, it will frustrate the Congressional purpose by permitting large un-

derwriting concerns to escape from the statutory prohibition.

ARGUMENT

I

IN THE ABSENCE OF A CHARGE OF FRAUD THERE IS NO REVIEW OF THE BOARD'S ORDERS ISSUED UNDER SECTION 30.

In determining when and to what extent judicial review of administrative rulings and decisions may be had this Court has not been governed by any rigid rules. It long since has determined, however, that, except where the Constitution commands it, there is no absolute "right" to such review. "The right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." *Ohio* v. *Akron Park District*, 281 U. S. 74, 80. Cf. *Reetz* v. *Michigan*, 188 U. S. 505. Even where administrative action has resulted in the taking of property, the Court has recognized that the legislature, in framing the law granting authority for such action, might appropriately act on "the policy that the greater good is sometimes secured by making certain classes of decisions final and ending litigation, even though in a particular case the individual is prevented by review from correcting some error which has injured him." *Crane* v. *Hahlo*, 258 U. S. 142, 148.

These principles are especially applicable where, as here, the administrative scheme concerns a subject over which the congressional power is

supreme and as to which there is no constitutional requirement of judicial review. Clearly a person chosen as an officer or director or employee of a member bank of the Federal Reserve system since the passage of Section 32 in 1933 takes the position subject to the restrictions which Congress has placed upon it. He has no vested or constitutional right to the office superior to the legislative limitations, including a limitation as to reviewability. In such cases "judicial review of administrative action may be granted or withheld as Congress chooses." *Estep* v. *United States,* 327 U. S. 114, 120. "Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297, 301." *Ibid.* And where in such circumstances Congress has seen fit to make administrative action final, this Court has refused to supply judicial review even where alleged errors of law have occurred. *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297.

It is recognized, however, that the question whether, in formulating a particular statutory scheme, Congress in fact intended to deny access to the courts to correct alleged administrative errors of fact or law does not always admit of easy solution. Certainly, "generalizations as to when judicial review of administrative action may

or may not be obtained are * * * hazardous." *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297. In ascertaining the congressional intent, especially as to statutes which are silent on the subject, there is need, as the Court emphasized in the *Switchmen's* and *Estep* cases, to consider the whole history and setting of the statute and the scheme of regulation which it was designed to embrace. The majority below has ruled that, notwithstanding the absence of any express provision therefor, there is a right of judicial review of the Board's orders issued pursuant to Section 30, and that such review may be afforded by the district court in the exercise of its general equitable jurisdiction. Its decision on this point is bottomed squarely upon the doctrinaire principle that, because the Board's ruling was predicated upon a construction of law, the content of that law "is a subject for judicial determination". (R. 24.)[1] Thus, in reaching its

[1] The majority opinion cites a number of cases, each of which arose under a statute containing a provision for judicial review, in support of the proposition that on "matters of law, unmixed, reviewing courts are free to substitute their own judgment" for that of the administrative office or agency (R. 25). This proposition is, of course, not disputed. Nor has the Board ever denied that the substantive issue here presented was one of law. The question here presented is not what rule is applicable when "reviewing courts" pass in judgment on decisions of administrative agencies, but rather what rule is applicable for determining whether Congress in a given statute intended there should be any review at all.

conclusion, the court below either ignored or rejected—at any rate it did not discuss—those considerations which this Court in the *Switchmen's* case, which also involved a question of law, said should be taken into account in determining whether or not to read a right of review into the statute. We turn now to a discussion of those factors in relation to the case at bar.

A. THE FEDERAL BANK SUPERVISORY SCHEME

Section 30 is but one of literally hundreds of legislative provisions which today comprise the federal bank supervisory scheme. The great bulk of those laws is contained in the National Bank Act, as amended,[2] originally passed in 1864, the Federal Reserve Act, as amended,[3] originally passed in 1913, and the Banking Acts of 1933[4] and 1935.[5] The latter two acts were largely amendatory of the first two, but in a few instances, as in the case of Section 30, they are complementary thereto. Responsibility for the administration of these statutes lies with the three bank supervisory agencies—the Comptroller of the Currency, who supervises national banks, the Board of Governors of the Federal Reserve System, which supervises member banks, and the Federal Deposit Insurance Corporation, which supervises non-member insured banks. Of course,

[2] 12 U. S. C. § 1, et seq.
[3] 12 U. S. C. § 221, et seq.
[4] 48 Stat. 162, c. 89.
[5] 49 Stat. 684, c. 614.

there is some overlapping and interlocking authority between these agencies, and occasionally, as in Section 30 proceedings, action by one agency is a necessary prerequisite of action by another. Only a very small percentage of the nation's banking institutions are not subject to some supervision by one or more of these three agencies.[6]

To each of the banking agencies has been granted extensive powers for regulating the banks within their respective jurisdictions. The comprehensive nature of these powers impelled this Court in *Cook County National Bank* v. *United States*, 107 U. S. 445, to say that the National Bank Act constitutes "by itself a complete system for the establishment and government of national banks." And it is particularly pertinent in this connection to note that, in granting such powers to the banking agencies, Congress consistently has used statutory language of the widest and most discretionary implications. From the first act of the organizers of an association formed under the National Bank Act to the last stages of receivership liquidations, national banks are subject to a wide variety of discretionary controls, principally under the aegis of the Comptroller of the Currency. Thus, the Comptroller is given authority to determine whether an association, formed un-

[6] There are approximately 14,000 commercial banks in the United States. Of these 5,012 are national banks, 1,875 are State member banks, and 6,446 are nonmember insured banks. See Federal Reserve Bulletin, August 1946, p. 931.

der the Act, may commence business;[7] changes in the capital structure of national banks may be had only subject to his "approval";[8] consolidations or conversions may be had only with his "approval";[9] branch banks may be opened only with his "approval";[10] he is authorized to "approve" certain exceptions to the making of loans in excess of statutory amounts;[11] he may by regulation permit national banks to act as insurance agents or brokers;[12] and, upon determining that a particular bank is insolvent, he may appoint a receiver therefor and generally supervise the receivership liquidation.[13]

The same broad language is likewise contained in the Federal Reserve Act. Thus, the Board "may" permit a bank to become a member of the Federal Reserve System;[14] if it should appear that a member bank has failed to comply with the Act or the Board's regulations, "it shall be within the power of the Board", after hearing, to require a member bank to surrender its membership, and the Board "may" restore such membership upon proof of compliance;[15] no organization

---

[7] 12 U. S. C. §§ 26, 27.
[8] 12 U. S. C. §§ 51a, 51b, 57, 58, 59.
[9] 12 U. S. C. §§ 33, 34a, 35.
[10] 12 U. S. C. § 36.
[11] 12 U. S. C. § 84.
[12] 12 U. S. C. § 92.
[13] 12 U. S. C. §§ 63, 191.
[14] 12 U. S. C. § 321.
[15] 12 U. S. C. § 327.

formed for the purpose of doing a foreign banking business may commence operations before its articles of association and organization certificate have been "approved" by the Board;[16] and the Board is authorized "in its discretion * * * as the public interest may require" to grant or deny a permit to a bank holding company to vote the stock of its controlled banks.[17]

These are but a few examples of the broad sweep of discretionary power which Congress has lodged in the banking agencies of the Government. As may be seen, many of them involve the exercise of purely administrative discretion, while others, such as the Comptroller's power upon a determination of insolvency to appoint a receiver for a national bank, involve decisions upon matters of traditional judicial cognizance. Yet, upon none of them has Congress superimposed a right of judicial review for the benefit of those affected by the administrative action. In all four of the banking statutes referred to above there is only one instance in which Congress provided a right of judicial review upon any action by a banking agency, and that section is now obsolete.[18]

---

[16] 12 U. S. C. § 614.

[17] 12 U. S. C. § 61.

[18] Section 47 of the National Bank Act (12 U. S. C. § 132) provides that the Comptroller of the Currency, upon notification that a national bank is in default on its circulating notes, may appoint a special agent to ascertain the fact. Such agent is to report to the Comptroller, who, if satisfied that the bank is in default, is authorized under Section 50 (12 U. S. C. § 192) to appoint a receiver for such bank. By the

Reference to that section, however, demonstrates that where Congress intended to provide such review it did so in clear and unmistakable terms. Clearly such a legislative course, pursued consistently in the banking statutes since 1864, can serve only to emphasize the Congressional intent to provide a system of banking supervision which can move swiftly, expertly, and definitively in meeting the difficult and often delicate banking situations which arise.

The above observations take on additional significance from another source. When Congress passed the Clayton Act in 1914 it wrote a section into the law prohibiting interlocking directorates between banks.[19] By Section 11 of that Act[20] it placed authority in a number of governmental agencies, including the Board, after hearing to order a person to "cease and desist" violations of that Act, including the section relating to interlocking directorates. Section 11, *inter alia*, also provided that any person required by an order of the Board "to cease and desist from a violation

---

terms of the latter section, however, the bank within 10 days of the appointment of the special agent for the purposes stated above may "apply to the * * * district, or territorial court of the United States, to enjoin further proceedings in the premises" on the ground that it has not refused to redeem its circulating notes. These provisions are now obsolete, however, since national banks no longer issue circulating notes.

[19] 15 U. S. C. § 19.

[20] 15 U. S. C. § 21.

charged" might "obtain a review of such order" in a circuit court of appeals.

So far as agency action is concerned, therefore, Section 11 of the Clayton Act and Section 30 of the Banking Act provide for almost identical procedures. Under the Banking Act the Board determines, after hearing, whether an officer or director is continuing to violate any provisions of the banking laws, including the prohibition against interlocking directorates contained in Section 32. Under the Clayton Act the Board, after hearing, determines whether a person is violating any of the provisions of that Act, including the one against interlocking directorates contained in that statute. However, in the Clayton Act there is a provision for judicial review of agency action. In the Banking Act there is not.

A logical and we think compelling explanation of this difference lies in the different traditions respecting judicial review encompassed by the respective statutory schemes. In the Clayton Act the statutory injunction against monopolies and unlawful combinations covers the entire field of "commerce", of which banking constitutes only a relatively small segment. Under that Act, the principal burden of enforcement was put upon the Interstate Commerce Commission and the Federal Trade Commission, each of which already were exercising broad regulatory powers in the field of commerce. And in creating and defining the authority of each of those agencies Congress

had provided comprehensive provisions respecting judicial review of their respective administrative decisions.[21] Furthermore, the Clayton Act specifically was designed to "supplement existing laws against unlawful restraints and monopolies",[22] and this substantive problem already had acquired a background of judicial tradition derived in principal part from the cases arising under the Sherman Act. Thus, in providing for judicial review of agency action under the Clayton Act, Congress was acting in harmony with legislative and judicial precedents set in earlier and related statutory schemes.

However, the banking statutes, as we have seen, rarely implicate the judiciary in effectuating the Congressional purpose. In this field the tradition lies in an exactly opposite direction. Consequently, this is further ground for assuming that in failing to provide for judicial review in the Banking Act, Congress entertained the specific purpose to make agency action final and definitive. Cf. *Switchmen's Union* v. *National Mediation Board, supra.*

B. THE JUDICIAL HISTORY OF THE FEDERAL BANKING STATUTES

The opinion below is in sharp contrast with the position consistently taken at all levels of the federal judiciary that the decisions and orders of

---

[21] See: 15 U. S. C. § 45, as to Federal Trade Commission; and 28 U. S. C. §§ 41 (28), 43–46, as to Interstate Commerce Commission.

[22] 38 Stat. 730, C. 323.

the banking agencies call for the exercise of expert judgment and discretion and, so long as they are made pursuant to lawful jurisdiction, and absent a charge of fraud, are beyond the powers of the courts to review.

Thus, this Court in *Bushnell* v. *Leland,* 164 U. S. 684, held conclusive the Comptroller's certificate of organization and refused to look behind his official determination. In *Apfel* v. *Mellon,* 33 F. 2d 805 (App. D. C.), certiorari denied, 280 U. S. 585, the court refused to test the sufficiency of the reasons which led the Board to disapprove the incorporation of a company attempted to be formed under the provisions of Section 25 (a) of the Federal Reserve Act, as amended (12 U. S. C. § 611, et seq.), to do a foreign banking business. Again, in *Raichle* v. *Federal Reserve Bank,* 34 F. 2d 910, the Second Circuit held that the courts were without power to review the action of the Board in changing the rediscount rates, it having been alleged that such action was ordered for the purpose of raising interest rates generally and to restrict the general supply of credit. In *Bailey* v. *Tillinghast,* 99 Fed. 801 (C. C. A. 6), the court refused to review the sufficiency of the Comptroller's certificate authorizing an increase in the bank's capital stock.

But it is in those cases growing out of the Comptroller's rulings resulting in the appointment of a receiver for a national bank and in levying assessments against stockholders under

the double liability provisions of the law where we find the most persuasive judicial precedents on the question. As indicated above, the Comptroller in taking such action makes decisions involving matters of traditional judicial cognizance, and there are striking analogies between such action and that of the Board taken pursuant to Section 30. In cases attacking the Comptroller's action in appointing a receiver for a national bank the courts consistently have rejected the plea to examine into the correctness of his decision. Thus, in *Wannamaker* v. *Edisto National Bank of Orangeburg*, 62 F. 2d 696, 700 (C. C. A. 4), the court said:

> The attempt in the bill to vacate the appointment of the receiver made by the Comptroller of the Currency and to enjoin the collection of the assessment upon the shareholders authorized by him, must likewise fail. We are dealing here with the extent of the power of the Comptroller to appoint a receiver for an insolvent bank, and to call for a ratable assessment upon its shareholders under the Act of June 30, 1876, § 1, 12 U. S. C. § 191 (12 USCA § 191); and it is settled that the determination as to the solvency of a national bank, and the necessity of an assessment against its shareholders, and the amount thereof, is committed exclusively to the judgment and discretion of the Comptroller, and it is not subject to judicial review.

In *Washington National Bank of Tacoma* v. *Eckels*, 57 Fed. 870, 872 (C. C. D. Wash.), the court pointed out that:

> the decision of the comptroller of the currency in this case, that the bank is insolvent, is to be taken as a finality. It is equivalent to the fact, whether the bank is really insolvent or not, so far as to authorize the exercise of the comptroller's power to put the bank in the hands of a receiver.

Again in *Liberty National Bank* v. *McIntosh*, 16 F. 2d 906 (C. C. A. 1927), the Court of Appeals for the Fourth Circuit pointed out that the jurisdiction of the Comptroller "in respect to all matters properly within his discretion is exclusive, and he is in respect thereto in no manner amenable to any court, nor is his action subject to review therein."

See also *Kennedy* v. *Gibson*, 8 Wall. 498, 505; *National Bank* v. *Case*, 99 U. S. 628, 634; *Bushnell* v. *Leland, supra; United States Savings Bank* v. *Morgenthau*, 85 F. 2d 811 (App. D. C.), certiorari denied, 299 U. S. 605, rehearing denied, 301 U. S. 666; *Harper* v. *Moran*, 76 F. 2d 980, 982.

In the comparatively recent case of *Adams* v. *Nagle*, 303 U. S. 532, this Court had under consideration the cognate question of the extent, if any, to which the Comptroller's action in ordering assessments, under the double liability provisions of the law, against stockholders of closed national banks may be reviewed by the courts. In the

course of its opinion the Court noted that several of the federal courts in similar proceedings had observed that such determinations by the Comptroller might be directly attacked for "clear error of law, fraud or mistake". This view the Court held "too broad" and indirectly, if not directly, limited the right to attack such action solely on the ground of fraud or bad faith on the part of the Comptroller. In its decision the Court used the following language which is particularly applicable here:

> The respondents rely upon decisions holding that a bill in equity or a writ of mandamus will lie to compel an executive officer to comply with the plain mandate of a statute. These have no application for they deal with a situation wholly foreign to that here presented. Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except upon certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; but if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he has exceeded his jurisdiction by reason of an error either of fact or law which induced his conclusion. *Plainly, therefore, the respondents are wrong in asserting that as the facts set*

forth in their bill charge the Comptroller with an error of law, he exceeded his authority.

The respondents further insist that their allegation that the Comptroller's action was "arbitrary," which is amplified and given content by the facts alleged and admitted by the motion to dismiss, requires a decree avoiding the assessment. The epithet "arbitrary," used in this connection, can mean no more than do the other averments that the Comptroller, in reaching his conclusion, "committed grave error of law" in failing to regard the contract of February 17 as effective. It would be arbitrary, in the proper sense of the term, for an official to act in the teeth of a statute or stubbornly to refuse to act at all where a statute commands action, but where he essays to exercise the jurisdiction conferred upon him, though his errors may be subject to subsequent correction, they cannot be enjoined as an arbitrary exercise of his authority. To hold otherwise would render orderly administrative procedure impossible.[23] [Italics ours.]

The authorities above cited make it abundantly clear that, because of the intricate and delicate

[23] Respondents did not charge, nor did the court below hold, that the Board acted "arbitrarily" in the instant case; indeed, in the face of such a strong dissent by Judge Edgerton (holding the Board's construction of the words "primarily engaged" correct, and the construction of those words by the majority below as "irrational") it could hardly be claimed that the Board acted "in the teeth" of the statute.

nature of the problems involved, the courts uniformly have refused to engraft a right of judicial review upon the decisions of the bank supervisory authorities made within their lawful jurisdictions.

C. THE PARTICULAR PLACE OF SECTION 30 IN THE FEDERAL BANK SUPERVISORY SCHEME

A vital portion of the basic jurisdictions of both the Comptroller and the Board is conferred upon them by Section 30. Nothing in the framework of that section nor in its legislative history suggests that, as to it, Congress intended a different rule to prevail with respect to judicial review than that which it had applied to those powers considered by the courts in the cases above referred to. On the contrary—and quite apart from the significant absence of any express statutory provision for judicial review—there are a number of considerations peculiar to Section 30 which require the conclusion that Congress particularly intended that no right of review should attach to the decisions made thereunder.

In the first place, until Section 30 was devised, the only effective power which the Comptroller had for dealing with an unsound management situation was the drastic one of closing the bank and appointing a receiver therefor—a power which he naturally was reluctant to use except in the clearest cases of insolvency. As pointed out by Senator Glass, who was the chairman of the subcommittee which conducted the hearings re-

sulting in the Banking Act of 1933, and who expounded its provisions to the Senate, the Comptroller frequently in the past had "been greatly perplexed and embarrassed" by the limitations upon his power. The Senator's remarks continued as follows:

> The comptroller has great reluctance to apply the drastic condemnation of the law. He waits, sometimes vastly too long, before he takes action. The comptroller now, who is a most worthy gentleman, scholarly, studious, courageous, I believe, in his testimony before the committee admitted that the comptroller's office—not himself, but the comptroller's office—had knowledge of the precarious condition of that large bank of Louisville the failure of which spread consternation and distress over a great part of that country and of another bank in Tennessee the failure of which did likewise; that the comptroller's office had knowledge that these banks were engaged in irregular and unsound if not actually illicit business five years before the failure came; that the files of the comptroller's office were replete with admonitory letters, with letters severely protesting against the practices in those banks over a period of years; but they did not close up the banks because of this reluctance of the comptroller's office to resort to that severe proceeding.
>
> I took the liberty of suggesting to the comptroller that he would have better

severely dealt with those banks five years theretofore, so that the failure which was inevitable when it came would not have been so extensive and disastrous. But he suggested, and we have acted upon the suggestion, that there should be a less drastic penalty. The only penalty now is to close up the banks. No matter how much he may admonish them, they disregard the admonition; they disregard what is called the "criticism" of the examiner and of the comptroller's office. So we have embodied in the bill a provision which authorized the comptroller and the Federal reserve agent, when a bank is found in irregular and illicit and unsound practices which it either fails or refuses to correct, to summon these bank officials to a court of inquiry and give them a thorough hearing and, if the facts sufficiently warrant it, to suspend or dismiss the officers of the bank.[24]

In supplying the banking agencies with this new power to remove an officer or director for unsound or illegal practices, the Congress obviously was acting in the belief that the expeditious use of such power might and would save the need for later invoking the more drastic one of closing the bank itself. And if the need for prompt and final action in the latter case be, as the courts have emphasized, ample reason for clothing the Comptroller's action in appointing a receiver with administrative finality, there is even more reason,

[24] 75 Cong. Rec. 9890.

we submit, for so concluding with respect to the Board's decisions under Section 30. In both situations there is a pressing need for prompt administrative action in order to prevent the evils of insolvency on the one hand, or unsound and illegal practices on the other, from causing further and perhaps disastrous financial consequences to the bank's creditors and stockholders.[25] Moreover, in appointing a receiver, the Comptroller pronounces the bank officially "dead", whereas in proceeding under Section 30 the Board is taking emergency measures to save its life.

Furthermore, in Section 30 proceedings we have not only to consider the dangers of *delay* incident to affording a removed officer or director his "day in court", but also the equally realistic dangers which a *public inquiry* into the *reasons* for the Board's action might entail. It cannot be doubted that the bank-depositor relationship is delicately hinged upon the confidence of the public. Mere

[25] Compare *Raichle* v. *Federal Reserve Bank*, *supra*, where the court observed that the idea of court intervention in reviewing the action of the Federal Reserve Bank in fixing the rediscount rate was "grotesque" since "the disease would ordinarily be long over before a judicial diagnosis could be made"; and *United States National Bank of La Grande* v. *Pole*, 2 F. Supp. 153, wherein the court pointed out that "since the protection of the public and the depositors is required, and the circumstances of emergency are such that there is often not time for court action without precipitating a catastrophe, the Legislative Department has seen fit to set the Comptroller over national banks and, in the statute which creates such associations, circumscribe the conditions of existence."

rumor can seriously impair that confidence. It follows that publicity of any sort to the charge that an officer or director is engaged in unsafe, unsound or illegal practices in the management of a bank would be sufficient in a critical time to destroy the bank itself. Under such circumstances it would be entirely illogical to suggest that, in devising a plan for the detection of potentially dangerous banking situations and the prevention of bank failures resulting therefrom, Congress intended to encumber its plan with a provision which might only serve to defeat its basic purpose.

That Congress intended to guard against such a result, however, is conclusively evidenced by the specific language of Section 30, which provides that the Board's order of removal, together with the findings of fact upon which it is based, "shall not be made public or disclosed to anyone except the director or officer involved, otherwise than in connection with proceedings for a violation of this section." It is not necessary to consider whether this prohibition is limited to the Board itself or extends to all parties involved in the proceeding.[25a] It is enough to say that it indicates a congressional desire to protect depositors and other persons interested in the solvency and soundness of a subject bank, by reducing to a minimum the disclosure of prejudicial facts. Since the pos-

[25a] The Government, of course, would not contend that the provision is a prohibition against free speech. The statute only relates to the publication of the Board's own order and finding.

sibility of judicial review of the Board's orders obviously would encourage the very publicity which the statute intended to avoid, the provision indicates how far from the mind of Congress was any thought that the orders of the Board would normally be judicially and publicly reviewable.

It is true, of course, that respondents' removal as bank directors was based upon a finding that they had continued to violate a banking law and not because they had participated in any alleged "unsafe" or "unsound" banking practices, and that the disclosure of the cause of removal in this case might not have affected the solvency of the bank. The section can hardly, however, be construed as differentiating between the cases it governs, so as to let publicity and reviewability depend on the likelihood that there will or will not be a run on the bank in the particular case. Furthermore, it cannot be said generally that the consequence of public disclosure that a bank director has violated one or more of the banking statutes will not be of the same character as the disclosure that a director has engaged in "unsafe" or "unsound" practices.

The Railway Labor Act contained no such express manifestation of legislative intent as is contained in Section 30. Nevertheless, in the *Switchmen's* case the court held that an administrative decision of the Mediation Board on a question of law could not be reviewed by the courts because the statutory scheme showed that no judicial re-

view was intended. We submit, therefore, that, judged in the light of the over-all pattern of federal banking legislation, the judicial history of that legislation generally, the need in Section 30 proceedings for prompt and definitive action, and the indication of a congressional intention that the Board's removal orders not be publicized, the rule applied in the *Switchmen's* case should be applied here. Jurisdiction in the courts to review Section 30 decisions should be denied on the ground that Congress intended that "the dispute was to reach its last terminal point when the administrative finding was made."

D. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT AFFECT THIS CASE

The writ of certiorari in the present case was granted on April 29, 1946 (R. 39). On June 11, 1946, the President approved the Administrative Procedure Act (Public No. 404, 79th Cong., 2d Sess.), which in Section 12 provides, among other things, that

> This Act shall take effect three months after its approval except that sections 7 and 8 [Hearings, Decisions] shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

The only section which could conceivably apply here would be Section 10—Judicial Review—

which became effective September 11, 1946. For the reasons pointed out below, pp. 34–36, we do not believe that this section was intended to change the scope of review applicable to a case such as the present one, nor to abrogate or limit the rule just discussed. But, in any event, and regardless of the scope of Section 10, we believe that its provisions are not and were not intended to apply to pending proceedings.

Neither in the Act nor its legislative history is there any reference to judicial proceedings seeking review of administrative action which had already been commenced. There is, throughout the legislative history, evidence of intent to afford the various agencies ample time to prepare and make such adjustments in their procedure as the provisions of the Act may require (H. Rep. No. 1980, 79th Cong., 2d Sess., p. 47; S. Rep. 752, 79th Cong., 1st Sess., p. 30), and this intent is underscored by the portions of Section 12 quoted above. It would be anomalous to suppose that Congress intended to make a procedural requirement of the Act inapplicable to an administrative proceeding initiated before the effective date of the requirement but applicable to a judicial proceeding concluded in the lower courts before the effective date of the requirement.[26]

---

[26] The general principle that statutes are not to be construed retrospectively, see *United States* v. *Heth*, 3 Cranch 399, 413, is applicable also to statutes governing procedure. E. g., *United States* v. *St. Louis, etc., Ry. Co.*, 270 U. S. 1, 3.

It is not necessary in this case to determine the precise point at which Section 10 would apply. It is sufficient to note that to have that section apply, as here, at some appellate stage of a pending proceeding, would not make for certainty or stability of administrative action, and would be productive only of confusion. While undoubtedly Congress had the power to change the scope of judicial review so as to affect pending proceedings, even at the ultimate appellate stage, the consequences of such a change would be so unsettling that clear and unmistakable evidence of an intention to effect that result should be required. Here there is no such evidence. Accordingly, it seems clear that the provisions of Section 10, which went into effect on September 11, 1946, were, at the very least, not intended to affect the scope of judicial review in proceedings in which certiorari had been granted well before that date.

In any event, the terms and legislative history of the Administrative Procedure Act make it abundantly clear that Section 10 was designed, in general, to restate existing law, and that there was no disposition on the part of the Act's sponsors to change the rule, that administrative action under this statute is not to be judicially reviewed. The relevant portion of that Act is

contained in Section 10 which provides, *inter alia*, as follows:

> SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

The provisions of Section 30 of the Banking Act are plainly of a type which "preclude judicial review" within the meaning of those words as used in the Administrative Procedure Act. That statute does not require that the preclusion be in express terms; indeed the word "express" as contained in an earlier draft of the bill was eliminated by the Senate Committee. Compare S. 7, 79th Cong., 1st Sess., as introduced in January 1945 with the bill as reported in S. Rep. No. 752, 79th Cong., 1st Sess., p. 36. As stated in the House Report accompanying that Act (House Report No. 1980, 79th Cong., 2d Sess., p. 41), "to preclude judicial review under this bill, a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."[27] The setting and

[27] See also letter of Attorney General to Chairman of Senate Judiciary Committee under date of October 19, 1945 (Senate Report No. 752, 79th Cong., 1st Sess., pp. 37, 43),

background of Section 30, and the specific statutory injunction contained in Section 30 against public disclosure of the Board's orders and findings is "clear and convincing evidence" of the congressional intent to withhold judicial review.

II

THE BOARD CORRECTLY INTERPRETED THE WORDS "PRIMARILY ENGAGED" AS USED IN THE STATUTE

Should the Court conclude that the Section 30 rulings of the Board are reviewable generally in the courts, then the issue presented on the merits concerns the proper interpretation of the words "primarily engaged" as used in Section 32 of the Banking Act of 1933 (12 U. S. C. § 78). As pointed out above, that section prohibits any individual, who is employed by a firm "primarily engaged" in the "underwriting" business, from simultaneously serving as a director of a member bank. The Board's order removed respondents as bank directors because the Board found that their employer, Eastman, Dillon & Co., was primarily engaged in the underwriting business within the meaning of Section 32.

---

wherein the Attorney General, in commenting upon the Administrative Procedure Act, specifically points out that Section 10 of that Act "declares the existing law concerning judicial review." The letter also calls attention to the fact that "A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review," citing as an example the *Switchmen's* case, *supra*, among others.

The majority opinion below reversed the Board's action on the ground that it had misconstrued the words "primarily engaged." It held that the Board should have applied a strictly quantitative test in construing those words and concluded that respondents' employer—which ranked ninth among 94 of the leading underwriting firms in the nation and which in one year alone did approximately $15,000,000 of underwriting business (R. 11)—was not "primarily engaged" in the underwriting business because the volume of its "brokerage" business and the profits therefrom exceeded that of its underwriting business. Thus, under the majority decision below, it becomes possible, notwithstanding the requirement of Section 32, for an employee of the largest underwriting firm in the country to serve as a bank director if 51% of the employer's business is brokerage, and 49% underwriting. *Per contra*, an employee of a firm doing an insignificant amount of underwriting may not serve as a bank director if the employer has even smaller quantities of other business.

Such a construction of "primarily engaged", as characterized by Judge Edgerton in his dissenting opinion, is "irrational". It imputes to Congress an intention to hazard the success of one of the important prophylactics in the 1933 Act upon so mercurial a test as a percentage comparison between different phases of an employer's business—where a difference of as little as a frac-

tion of 1% might be decisive one way or the other.[28] Clearly such a test, which leaves a gaping hole in the armor of the statute,[29] might lead to the absurd result, which the Board's opinion implied (R. 13), that the Act would apply to no one. In avoiding such an absurd result in other cases, this Court, as pointed out by Judge Edgerton, has not hesitated to apply "highly obscure and even wholly unheard-of meanings of ordinary words * * * in order to avoid a result which Congress did not intend" (R. 34). And the following statement of the Court in *United States* v. *American Trucking Association,* 310 U. S. 534, 543, is quite apposite:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to

[28] If such be the test, is it to be applied yearly, quarterly, monthly, weekly or perhaps even daily?

[29] As pointed out in the dissenting opinion of Judge Edgerton, the statutory purpose is made perfectly clear by the express provision which authorizes the Board to make regulations which permit men within the prescribed class to serve as bank directors "when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments."

> the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.

The Board's interpretation of "primarily engaged" provides a much more stable and less variable formula than that adopted by the majority below and seems more in harmony with the Congressional purpose. In substance it is this: An employer is "primarily engaged" in the underwriting business whenever such employer is "essentially" or "fundamentally" engaged in underwriting activities, for then the evil against which Section 32 was directed might be present if its employee were permitted to serve as a director or officer of a bank. This interpretation not only harmonizes with the statutory purpose but it is also literally correct. While it is true, as pointed out in the majority opinion, that the word "primarily" is defined as meaning "firstly" or "chiefly", and that this meaning carries a connotation of quantity, the word is also defined by reputable dictionaries[30] as "essentially" or "fundamentally". The latter meaning connotes substantiality and not merely proportional priority. In choosing between such definitions the Board em-

[30] Funk & Wagnalls' New Standard Dictionary; Webster's New International Dictionary; The Oxford Dictionary.

ployed a "normal process of statutory construction"; its purpose in doing so was "to give effect * * * to the probable intention of the legislature."[21]

Such has been the Board's consistent administrative interpretation of the section. While its rulings interpreting Section 32 have not generally been published, due to the confidential nature of the problem involved, the Solicitor General has been advised by the Board that since the enactment of Section 32 in June 1933 it has formally considered twelve requests posing the identical question here presented. Its rulings upon these requests, which covered a period running from July 1934, shortly after the statute here in question was enacted, up until 1944, are set out in the Appendix hereto, with the names deleted. In all of them the Board has interpreted the section as applying to companies which were substantially engaged in the underwriting business although not to the extent of over 50% of the business. The situation here, therefore, calls for the application of the settled rule that the practical and consistent interpretation for a long period of an ambiguous statute by the governmental agency charged with its administration is entitled to the highest respect and will not be disturbed except for very cogent reasons. *Skidmore* v. *Swift & Co.*, 323 U. S. 134; *Logan* v. *Davis*, 233 U. S. 613, 627; *Great Northern Ry.*

[21] See dissenting opinion (R. 35).

Co. v. *United States,* 315 U. S. 262, 275; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315. As the Court stated in the last cited case, "The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

In overruling the Board's construction of "primarily engaged" the majority below purported to find support for their action in the wording of related sections of the Act as well as in the language of the report of the Banking and Currency Committee of the Senate (Senate Report No. 77, 73rd Congress, 1st Sess.) on the bill which ultimately became the Act. Before discussing these points in detail, however, it will be helpful briefly to advert to the circumstances giving rise to the Banking Act of 1933 and the purposes which it was designed generally to achieve.

The 1933 Act was essentially a reform measure. Since 1925 the banking structure of the country had suffered progressive deterioration, which had culminated in the Banking Holiday in March 1933. Bank failures had "reached an unprecedentedly high level after a long continued growth extending over a decade." (Senate Report No. 77, *supra,* p. 5). That this condition had contributed substantially to the stock market crash

of 1929 and the great depression which followed was acknowledged on all sides.

However, in passing the Banking Act of 1933 Congress did not attempt a complete revision of the federal banking laws. As pointed out in Senate Report No. 77, *supra*, p. 2, it was felt that "immediate emergencies were so great that it was wise to defer the preparation of a completely comprehensive measure for the reconstruction of our banking system, such as had been urged by some responsible men." Hence, it was decided "to construct a bill to correct manifest immediate abuses, and to bring our banking system back into a stronger condition." *Id.*

The bill itself contained 48 sections, covering a wide and heterogeneous topical range. Generally speaking, it erected safeguards against certain specific abuses, strengthened the hands of the bank supervisory agencies, increased the controls over the volume and use of bank credit, and provided for the insurance of bank deposits throughout the country.

Section 32 concerns but one facet of a much broader problem which is dealt with in a number of other sections of the Act. The Congressional inquiry had disclosed that, chief among the evils contributing to the 1929 panic, had been the practice, of comparatively recent origin, of the intermingling of the commercial and savings banking business with that of underwriting and the flotation of security issues. One of the symptoms of

this evil had been the rapid growth and development of the so-called "securities affiliate"—an organization either owned by or under common control with a bank, and engaged exclusively in the investment and underwriting business. In discussing this general subject, Senate Report No. 77 in pertinent part states as follows (pp. 8–10):

Condition of Member Banks

The outstanding development in the commercial banking system during the prepanic period was the appearance of excessive security loans, and of overinvestment in securities of all kinds. The effects of this situation in changing the whole character of the banking problem can hardly be overemphasized. National banks were never intended to undertake investment banking business on a large scale, and the whole tenor of legislation and administrative rulings concerning them has been away from recognition of such a growth in the direction of investment banking as legitimate. Nevertheless it has continued; and a very fruitful cause of bank failures, especially within the past three years, has been the fact that the funds of various institutions have been so extensively 'tied up' in long-term investments. The growth of the investment portfolio of the bank itself has been greatly emphasized in importance by the organization of allied or affiliated companies under State laws, through which even more extensive advances and invest-

ments in the security market could be made. * * *

* * * * *

Analysis of Present Banking Problem

2. *Banking affiliates.*—There seems to be no doubt anywhere that a large factor in the overdevelopment of security loans, and in the dangerous use of the resources of bank depositors for the purpose of making speculative profits and incurring the danger of hazardous losses, has been furnished by perversions of the national banking and State banking laws, and that, as a result, machinery has been created which tends toward danger in several directions.

(a) The greatest of such dangers is seen in the growth of "bank affiliates" which devote themselves in many cases to perilous underwriting operations, stock speculation, and maintaining a market for the banks' own stock often largely with the resources of the parent bank. This situation was never contemplated by the National Banking Act, and it would, therefore, appear that the affiliate system calls for the establishment of some legislative provisions designed to deal with the situation. It has been suggested from many quarters that the affiliate system be simply "abolished." This suggestion has much authority behind it, but, in addition to the manifest difficulty of enforcement, owing to the existence of well-known subterfuges to maintain control, there remains the question whether it would

be of much real service so long as State legislation permits the growth of affiliates in connection with State banks and trust companies. The committee has, therefore, determined to present proposed legislation aimed at the following objects:

(1) To separate as far as possible national and member banks from affiliates of all kinds.

(2) To limit the amount of advances or loans which can be obtained by affiliates from the parent institutions with which they are connected.

(3) To install a satisfactory examination of affiliates, working simultaneously with the present system of examination applicable to the parent banks.

With such considerations in mind Congress wrote into the bill a number of sections intended to separate the business of commercial and savings banking from that of underwriting. Thus, Section 20 of the Act[32] (12 U. S. C. § 377) provided,

---

[32] Section 20 provides as follows:

"SEC. 20. After one year from the date of the enactment of this Act, no member bank shall be affiliated in any manner described in section 2 (b) hereof with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stock, bonds, debentures, notes, or other securities: *Provided*, That nothing in this paragraph shall apply to any such organization which shall have been placed in formal liquidation and which shall transact no business except such as may be incidental to the liquidation of its affairs."

718375—46——4

inter alia, that after one year "no member bank shall be affiliated in any manner described in section 2 (b) [33] hereof with any corporation * * * or other similar organization engaged principally in the * * * underwriting * * * of stocks, bonds, debentures, notes, or other securities".[34]

---

[33] Section 2 (b) provides as follows:

"(b) Except where otherwise specifically provided, the term 'affiliate' shall include any corporation, business trust, association, or other similar organization—

"(1) Of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or

"(2) Of which control is held, directly or indirectly, through stock ownership or in any other manner, by the shareholders of a member bank who own or control either a majority of the shares of such bank or more than 50 per centum of the number of shares voted for the election of directors of such bank at the preceding election, or by trustees for the benefit of the shareholders of any such bank; or

"(3) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one member bank." (12 U. S. C. § 221a.)

[34] A related section to Section 20 was Section 21 (12 U. S. C. § 378), which provided that after one year it should be unlawful for any organization "engaged in the business of * * * underwriting * * * to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor".

In Section 19 [35] (12 U. S. C. § 61), in providing for the first time some measure of federal control over bank holding companies, Congress required that, in applying for a permit to vote its stock in controlled banks, the holding company must "show that it does not own, control, or have any interest in, and is not participating in the management or direction of, any corporation * * * or other similar organization formed for the purpose of, or engaged principally in * * * underwriting", etc. It further provided that if, at the time it filed its application, the holding company had any such prohibited interest, it should agree to "divest itself" of such interest within five years.

[35] Section 19 (e) provides as follows:

"(e) Every such holding company affiliate shall, in its application for such voting permit, (1) show that it does not own, control, or have any interest in, and is not participating in the management or direction of, any corporation, business trust, association, or other similar organization formed for the purpose of, or engaged principally in, the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds, debentures, notes, or other securities of any sort (hereinafter referred to as 'securities company'); (2) agree that during the period that the permit remains in force it will not acquire any ownership, control, or interest in any such securities company or participate in the management or direction thereof; (3) agree that if, at the time of filing the application for such permit, it owns, controls, or has an interest in, or is participating in the management or direction of, any such securities company, it will, within five years after the filing of such application, divest itself of its ownership, control, and interest in such securities company and will cease participating in the management or direction thereof, and will not thereafter, during the period that the permit remains in force, acquire any further ownership, control, or interest in any such securities company or participate in the management or direction thereof; and (4) agree that thenceforth it will declare dividends only out of actual net earnings."

Thus, Sections 19 and 20 were aimed specifically at the "affiliation" of banks with underwriting concerns; hence, the provision against the bank or its parent "controlling" or participating in the "management" of such companies. But there was also the danger, closely allied to that of direct "affiliation", that, through interlocking directors and officers, some of the evils of "affiliated" relationships might be perpetuated. Thus, a bank director, forgetting his fiduciary relation to the bank, might be tempted to use his influence to control the investment policies of the bank to the extent of making investments in securities which his employer might at the moment have for sale. Or, such an officer or director might be tempted to use the bank's depositor list to secure leads, and then to give investment advice to the bank's customers on the basis of purely personal and selfish considerations. These very alarms were sounded by Senator Bulkley when speaking on the "affiliation" subject at the time the bill was being debated in the Senate. He stated, in part, as follows:

> Obviously, the banker who has nothing to sell to his depositors is much better qualified to advise disinterestedly and to regard diligently the safety of depositors than the banker who uses the list of depositors in his savings department to distribute circulars concerning the advantages of this, that, or the other investment on which the bank is to receive an originating profit or

an underwriting profit or a distribution profit or a trading profit or any combination of such profits."[28]

The evil against which Section 32 was aimed is thus directly related to the evil against which Sections 19 and 20 were directed, namely, the intermingling of the banking and underwriting businesses. To such extent the three sections are thus *in pari materia*. But that does not require, as the majority below in effect concluded, that, in attaining the specific objectives sought by each section, there is necessarily a common test to be applied to all. Thus, the majority below pointed out that "in separating member banks from outside interests, [Congress] went only so far as to prohibit control." From this fact the majority reasoned that because the test of "control" may lie in the ownership of a "majority" of the shares of a corporation, such quantitative concept should be carried over and applied to the term "primarily engaged", as used in Section 32. Such a conclusion, we submit, is plainly a *non sequitur*. It ignores the distinction between the basic objectives sought by the different sections. Clearly, the fact that Congress felt that a majority of corporate shares might be essential to the "control" of a corporation is no ground for concluding that a bank director might be tempted to influence the investment policies of the bank and its customers only if 51% or more of his

[28] 75 Cong. Rec. 9912.

employer's business was that of underwriting. The dissenting opinion of Judge Edgerton clearly and concisely disposes of this phase of the majority opinion. He said:

> From the fact that Congress made a "majority" of one sort critical in sections of the Act where it used the word "majority," the court infers that Congress meant to make a majority of another sort critical in § 32 where it did not use the word. To me the opposite inference, if either, would seem to be suggested. But the contexts are so different that no inference is suggested. They are so different that the court's argument comes to this; by recognizing that majorities of votes control corporations, Congress implied that a man's qualification to serve as a bank director should turn upon a majority of the business activity in which he is engaged. The sections on which the court relies concern affiliates of banks. The purpose of Congress, in those sections, was to prevent banks from controlling underwriting corporations. Since control of a corporation depends upon control of a majority of directors, or ownership or control of a majority of voting shares or of shares voted, Congress made such majority control the measure of prohibited affiliation. In respect to the control of a corporation, 51 per cent of directors or of voting stock is a wholly different matter from 49 per cent. But in § 32 Congress did not aim at

> control, either of underwriters by banks or of banks by underwriters; and even if Congress had aimed at control, the question whether underwriting was or was not a majority of a firm's business would still have been irrelevant to its purpose. Section 32 is aimed only at the likelihood that a bank director who is interested in the underwriting business may exert influence upon his bank or its customers in favor of that business. The likelihood that he will do this does not depend in any degree upon the question whether the underwriting business is 51 per cent or 49 per cent of the business in which he is interested. The fact that Congress expressly treated a majority of voting power as critical where it makes sense to do so has no tendency to show that Congress meant to treat a majority of business activity as critical where it would not make sense to do so.

The same observations may be made concerning the conclusion, reached by the majority below, that because Congress did not intend to "abolish" the affiliate system, such fact "lends weight to the idea that in using the word 'primarily' in its description of the prohibited relationship in Section 32 of the Act, Congress intended a restricted scope rather than totality in the prescribed separation" (R. 30). In the first place, we fail to see any logical connection between the failure of Congress to take action abolishing affiliates and its positive action in directing that bank

directorates be freed from the potentially dangerous influences of directors employed by underwriting concerns. The Congressional purpose as to each such matter is obviously entirely different. In the second place, no one has contended that Congress prescribed "totality" of separation in Section 32; nor did the Board so construe that section. Under the Board's interpretation, only those firms which are "substantially" engaged in the underwriting business are brought within the definition of "primarily engaged".

The majority opinion below also purports to derive support for its interpretation of "primarily engaged" from the decisions of the Securities and Exchange Commission construing that and similar phraseology contained in the Public Utility Holding Company Act.[37] The opinion points out that, under Section 2 (a) (3) of that Act,[38] the Commission is authorized to exempt a utility company from the requirements of the law if it finds that such company "is primarily engaged in one or more businesses other than the business of an electric utility company". The opinion also refers to similar language contained in Section 3 (a) (3) of the Utility Act[39] which furnishes grounds for exemption to utility holding companies. The opinion goes on to point out

[37] 15 U. S. C. § 79.
[38] 15 U. S. C. § 79b (a) (3).
[39] 15 U. S. C. § 79c (a) (3).

that, while the Commission in construing these sections appears never to have defined the phrase "primarily engaged", nevertheless "the findings of fact underlying its conclusions appear always to have been quantitative in nature and it uses the terms 'principal business' and 'principally engaged' as synonymous with 'primarily engaged' ", citing a number of Commission decisions in support of this statement (R. 31).

The majority's reliance upon the Securities and Exchange Commission decisions seems misplaced. In the first place, the statutory setting and purpose of the words "primarily engaged" in the two statutes play exactly opposite roles in the respective statutory schemes. In the Utility Act the words are contained in a section which authorizes the Commission to hold that an applicant is *without* the law; whereas in the Banking Act the words are used as the basic test for bringing a particular situation *within* the law. As both statutes are remedial in nature exactly opposite rules of statutory construction are, therefore, applicable; exemption provisions are to be strictly construed against one seeking an exemption,[40] while provisions having an inclusive effect

[40] Cf. *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, 286 U. S. 299; *Spokane & Inland Empire Railroad* v. *United States*, 241 U. S. 344; *Berryman* v. *Board of Trustees of Whitman College*, 222 U. S. 334.

are to be liberally construed"—both rules predicated upon the principle of affording the fullest judicial range for accomplishing the legislative purpose.

Furthermore, the test of "primarily engaged" in the sections of the Utility Act referred to above is not, as is the case in Section 32, the *sole* test provided in such sections. The test of exemption in Section 2 (a) (3) is whether the utility "is primarily engaged in one or more businesses other than the business of an electric utility company, *and by reason of the small amount of electric energy sold . . . it is not necessary in the public interest*" that such company be made subject to the law. [Italics ours.] So that in granting or denying an application under this section the Commission must consider not only whether a utility is "primarily engaged" in "one or more" other businesses, but it must also consider whether such utility sells only a "small" amount of electricity to the public. And the Commission decisions cited by the court are at pains to develop the latter point. In each of those cases arising under Section 2 (a) (3) the Commission calls specific attention, among other things, to the relatively insignificant amount of electric energy which was being publicly sold by the applicant.[42]

[41] Cf. *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, *supra*, note 40; *Johnson* v. *Southern Pacific Company*, 196 U. S. 1; *Korbly* v. *Springfield Institution for Savings*, 245 U. S. 330.

[42] See *In the Matter of Aluminum Company of America*, 3 S. E. C. 640, 650; *In the Matter of Sloss-Sheffield Steel &*

The same may be said of Commission decisions interpreting Section 3 (a) (3). There the Commission's inquiry, in addition to whether the holding company is "primarily engaged" in other businesses, also includes whether such company is "*only incidentally*" a holding company and "not deriving * * * any material part of its income" from its utility subsidiaries. (Italics ours.) And in construing this section the Commission has flatly rejected a purely quantitative test as conclusive on the question of exemption. Thus, in *In the Matter of Cities Service Company*, 8 S. E. C. 318, it appeared that the applicant owned, directly or indirectly, a controlling stock interest in more than 150 operating subsidiaries doing business in 39 states and foreign countries and engaged principally in three industries—electric light and power, natural gas, and petroleum. The aggregate fixed assets of applicant's consolidated utility subsidiaries at book value represented only 47% of the book value of the fixed assets of all consolidated subsidiaries. In addition, the aggregate gross revenue of its consolidated utility subsidiaries was only 30% of its gross revenues from all sources. The applicant urged that, as it was "primarily engaged" in other businesses, such fact necessarily made it "only incidentally" a holding company within the meaning of Section

---

Iron Company, 3 S. E. C. 460, 461; *In the Matter of International Paper Company*, 9 S. E. C. 937, 940.

3 (a) (3). In rejecting this argument the Commission stated, *inter alia*, as follows:

> "We are of the opinion, therefore, that the question whether a holding company satisfies this requirement of Section 3 (a) (3) must be determined in each case upon consideration of a variety of circumstances; such as the relationship between the gas and electric operations of the company's utility subsidiaries and the other business or businesses in which it is engaged or interested—*i. e.*, whether the business of the utility subsidiaries is incidental or accessory to the nonutility business or is wholly unrelated to it—the size of the company's utility subsidiaries and the scope of their operations, and, where the utility business is small, the company's stake in the utility business as compared with its interest in other lines of business.

The majority below also refers to a number of decisions interpreting the Bankruptcy Act, as amended. They call attention to the fact that Section 75 (r) of that Act [49] grants an exemption to a person "primarily bona fide personally engaged" in farming and that the courts in construing Section 75 (r) "uniformly recite quantitative tests" (R. 32).

Here again, however, the majority below has failed to take into account important distinctions

[49] 11 U. S. C. § 203 (r).

between the purpose and setting of the word "primarily" in the two statutes. Section 75 of the Bankruptcy Act deals generally with the subject of agricultural compositions and extensions. It provides for farmers the same type of relief from the ordinary processes of bankruptcy as Chapter X of the Bankruptcy Act [44] provides for corporations through the mechanism of reorganization. Section 75 (r) defines the word "farmer" both as it is used in Section 75 generally and as it is used in Section 4 of the Act,[45] which exempts a "farmer" from adjudication as an involuntary bankrupt. Clearly this statutory setting is as different from that of Section 32 of the Banking Act as are Sections 2 (a) (3) and 3 (a) (3) of the Utility Act from both. It is not to be supposed that Congress, in expressly creating certain rights and exemptions for "farmers", intended to extend those privileges to those who are engaged in a variety of other occupations to a substantial degree.

Furthermore, the test of "primarily" in the Bankruptcy Act, as the test of "primarily engaged" in the Utility Act, is not the *sole* test for determining who is a "farmer". Section 75 (r) defines a farmer as "an individual who is primarily bona fide personally engaged" in farming and also *"any individual . . . the principal part of whose income is derived from"* farming.

[44] 11 U. S. C. § 501, et seq.
[45] 11 U. S. C. § 22 (b).

[Italics ours.] Thus, in determining who is a "farmer" within the meaning of Section 75 (r), the courts are required to consider not only whether a person is "primarily bona fide personally engaged in farming" but also whether the "principal part of his income is derived" from farming. This fact tends to explain the judicial expressions quoted by the majority below and to mitigate their value, if any, as an accurate guide for construing "primarily" as used in Section 32 of the Banking Act.[46] Indeed, this Court has emphasized the *dual nature* of the test to be applied in determining who is a "farmer" within the meaning of Section 75 (r) and refused to fix an abstract meaning to either, holding that each case must be determined upon the basis of the "totality of the facts" disclosed by the record. *First National Bank & Trust Company* v. *Beach*, 301 U. S. 435.

---

[46] One of the quotations referred to below—"The evidence does not support the conclusion that he was engaged chiefly in farming or tillage of the soil" (R. 32)—was taken from the case of *Swift* v. *Mobley*, 28 F. 2d 610 (C. C. A. 5, 1928), decided almost five years before the term "farmer" appeared in or was defined by the Bankruptcy Act. That case specifically involved Section 4 (b) of the Bankruptcy Act which exempted from involuntary bankruptcy "a person engaged *chiefly* in farming," etc. [Italics ours.]

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

GEORGE B. VEST,
General Counsel,

J. LEONARD TOWNSEND,
Assistant General Counsel,
Federal Reserve Board.

OCTOBER 1946.

APPENDIX

FEDERAL RESERVE BOARD,
July 14, 1934.

DEAR SIR: Your letter of June 7, 1934, to the Federal Reserve Agent at [City], regarding your application for a permit under Section 32 of the Banking Act of 1933, to serve as a director of "X" Bank, as a director of "Y" Bank, and as a partner of "Z" and Company, has been referred to the Board for its consideration.

You request that the Board give further consideration to your application on the ground that "Z" and Company is primarily a stock exchange brokerage house and is not "engaged primarily in the business of purchasing, selling or negotiating securities." You state that for a period of years that firm has substantially retired from the underwriting business, with the exception of an occasional municipal issue and that strict brokerage for some time has constituted by far the principal part of its business and source of the firm's income. Also, you have furnished figures showing the comparative income from brokerage business and from trading and syndicate business which has accrued to the firm during the five years ending with 1933, and the percentages attributable to each type of such business.

The position taken by the Board in its letter to you in which it stated that it was unable to find that it was not incompatible with the public

interest to grant your application in this matter was based on information submitted by you indicating that the firm of "Z" and Company is a dealer in securities. Moreover, your letter shows that during the year 1933 the firm derived more than a quarter of a million dollars income from that type of business. Furthermore, the firm appears to hold itself out to the public as a dealer in securities as well as a broker and during the present month on two different occasions the firm's name has appeared before the Board as a member of a syndicate in connection with the applications of member banks for permits under Section 32 to perform the functions of a correspondent bank for such syndicate members pursuant to agreements for underwriting and selling securities.

In the light of the foregoing and all the circumstances involved, the Board does not believe that it may properly find that "Z" and Company is not primarily a dealer in securities within the meaning of the provisions of Section 32 of the Banking Act of 1933, despite the fact that its income from that business is less than its income from its brokerage business. As was stated in its previous letter the Board believes it was the purpose of Congress in enacting Section 32 to terminate relationships of the types described in that section between member banks and dealers in securities in the absence of special circumstances in the particular case which might justify the granting of a permit covering the relationships, and, in view of the policy as declared by Congress in the law, it is not the practice of the Board in cases of this kind to issue permits au-

thorizing interlocking officer or directorate relationships which fall within the scope of the prohibitions of Section 32. Accordingly, since there do not appear to be any special circumstances which would justify the granting of a permit in your case, the Board is unable to find that it would not be incompatible with the public interest to grant your application.

The Board is not unsympathetic with your wishes to continue to serve your firm and the two member banks, but as indicated above it believes that the facts pertaining to the type of business in which "Z" and Company is engaged are such as to bring that company within the scope of Section 32, and, in view of the purposes underlying the enactment of that section, the Board feels that it may not properly make an exception and grant a permit in your case. It will therefore be appreciated if you will advise the Federal Reserve Agent at the Federal Reserve Bank of [City], of the action which you take in order to comply with the provisions of the law.

Very truly yours,

(Signed) Chester Morrill

CHESTER MORRILL,

Secretary.

FEDERAL RESERVE BOARD,

July 24, 1934.

DEAR SIR: The Federal Reserve Board has given consideration to your application for a permit under Section 32 of the Banking Act of 1933 to serve as a director of the "X" Bank and as a partner of "Z" and Company, both of [City],

and to your letter of June 26, 1934, to the Federal Reserve Bank of [City] in which letter you have submitted additional information in connection with your application.

You have stated that the firm of "Z" and Company has not limited its business of dealing in and underwriting securities and proposes to continue such business as long as the laws governing the same permit. You also have shown that for the period from June 1, 1933 to May 31, 1934, the profits of the firm were as follows:

Commissions received	$155,232.21
Profit in interest account	34,504.85
Profit from investment, trading and syndicate accounts	38,722.99

The above figures represent the following percentages of the firm's total income:

Profit from commission account	68.0%
Profit from interest account	15.1%
Profit from investment, trading and syndicate accounts	16.9%

The Federal Reserve Board believes that it was the intent of Congress in enacting Section 32 to terminate all relationships of certain types between member banks and dealers in securities, apparently because it felt that such relationships might tend to influence in a manner which Congress deemed to be incompatible with the public interest the bank's credit and investment policies and their advice respecting investments to their correspondent banks and other customers. Consequently, the Board feels that it may not properly grant permits authorizing relationships which are actually of the kind referred to in that section and that its authority to issue such permits should be exercised only in exceptional cases, for example, those which are included within the literal terms of the statute but which are actually of a kind

different from the relationships at which its provisions were directed.

On the basis of the information submitted, the firm of "Z" and Company appears to be "engaged primarily in the business of purchasing, selling, or negotiating securities" within the meaning of Section 32, notwithstanding the fact that the profit derived by the firm from that type of business is less than its profit from other types of business carried on by the firm. In the circumstances, the relationship covered by your application appears to come within the class which the Board believes Section 32 was designed to terminate and it is therefore unable to find that it would not be incompatible with the public interest, as declared by Congress, to grant your application.

In the event that you desire to submit further facts or arguments in support of your application, the Board is prepared to give them careful consideration. However, any additional facts or arguments should be submitted as promptly as possible, in writing, to the Federal Reserve Agent.

Very truly yours,

(Signed) Chester Morrill

CHESTER MORRILL,

Secretary.

FEDERAL RESERVE BOARD,

August 16, 1934.

DEAR SIR: The Federal Reserve Board has given consideration to your application for a permit under Section 32 of the Banking Act of 1933 to serve as a director of the "X" Bank and as a partner of "Z" and Company.

It appears from the information which you

have submitted in support of your application that "Z" and Company is a stock exchange firm, with memberships on the New York Stock Exchange and the New York Curb Exchange and that for many years it also has maintained a Trading Department, the activities of which are largely confined to dealing in the preferred stocks of public utility companies, which stocks it buys and sells as principal. It has been stated that while the firm has never acted as underwriter in connection with the issue of securities and does not now participate in syndicates, it would engage in the latter type of business if opportunity permitted and that the firm has applied for registration as investment banker under the Investment Bankers Code. No figures have been submitted which show the relative proportions of the firm's commission business and its business as a dealer for its own account, although it appears that revenue from the latter type of business constitutes approximately 30 percent of the firm's total revenue.

The Federal Reserve Board believes that it was the intent of Congress in enacting Section 32 to terminate all relationships between member banks and dealers in securities apparently because it felt that such relationships might tend to influence in a manner which Congress deemed to be incompatible with the public interest the banks' credit and investment policies and their advice respecting investments to their correspondent banks and other customers. Consequently, the Board feels that it may not properly grant permits authorizing relationships which are of the kind referred to in that section and that

its authority to issue permits should be exercised only in exceptional cases such as those which are included within the literal terms of the statute but which are actually different from the relationships at which the provisions of the section were directed.

On the basis of the information which has been submitted, the firm of "Z" and Company appears to be "engaged primarily in the business of purchasing, selling, or negotiating securities" within the meaning of Section 32, notwithstanding the fact that the profit derived by the firm from that type of business appears to be less than its profit from the other types of business carried on by the firm. In the circumstances, the relationship covered by your application appears to come within the class which the Board believes Section 32 was designed to terminate and the Board is therefore unable to find that it would not be incompatible with the public interest, as declared by Congress, to grant your application.

In the event that you desire to submit further facts or arguments in support of your application, the Board is prepared to give them careful consideration. However, any additional facts or arguments should be submitted as promptly as possible, in writing, through the Federal Reserve Agent. If you do not wish to submit any such additional facts or arguments it will be appreciated if you will notify the Federal Reserve Agent of the steps which you take in order to comply with the provisions of Section 32.

Very truly yours,

CHESTER MORRILL,
Secretary.

FEDERAL RESERVE BOARD,
January 12, 1935.

Mr. "R"
Federal Reserve Agent,
Federal Reserve Bank of [City].

DEAR MR. "R": Reference is made to Mr. "P's" letter of October 22, 1934, regarding the application of Mr. "A" under the provisions of section 32 of the Banking Act of 1933 for a permit to serve as an officer and director of "X" Bank and the "Z" Company both of [City]. Mr. "P" inclosed a copy of a letter dated October 19, 1934, from Mr. "A", containing additional information regarding the business of "Z" Company.

As you know, there has been considerable correspondence regarding this application for the purpose of ascertaining the exact nature of the business of "Z" Company. The company apparently acts as dealer, broker, and investment counsellor. In a letter to the Comptroller of the Currency, dated August 10, 1934, the president of the national bank stated that "fully three-fourths of the business of the 'Z' Company comes from investment counsellor activities, and the direct sales represent a much smaller part". However, the subsequent correspondence has indicated that the investment counsellor activities include transactions in which the company also acts as dealer or as broker, receiving a single fee or commission for the entire transaction. Mr. "A" has stated that he finds it difficult to separate and allocate the income of the company to the three types of business in which the company appears to be engaged, although he has expressed

a sincere desire to furnish the required information.

However, in his letter of October 19, 1934, Mr. "A" has furnished figures showing that, for the year ending September 18, 1933, the company derived profits from participations in syndicates and selling groups and from selling concessions amounting to $5,678.75, and for the year ending September 18, 1934, profits from these sources of $7,871.41. For the former year it derived profits of $5,001.32 from the sale of securities belonging to it, and for the latter year profits of $1,030.18 from that source.

As you know, the Board believes that it was the intent of the Congress in enacting section 32 of the Banking Act of 1933 to terminate relationships of certain types between member banks and dealers in securities because of the possible undesirable effect which such relationships might have upon the member banks' investment policies and its policies in dealing with its customers. The Board has therefore taken the position that it may not properly grant permits covering relationships which are actually of the kind referred to in that section but that its authority to issue permits should be exercised only in exceptional cases, for example, those which fall within the literal terms of the statute but which are actually not within its intendment.

Of course, the denial of an application under these circumstances cannot be taken as implying that the particular relationship has actually been characterized by any of the undesirable practices which led the Congress to enact section 32, but signifies only that the Board is of the opinion

that the particular relationship is of a kind to which the Congress referred in section 32 and which the Board believes the Congress desired to terminate in order to avoid the dangers which it had in mind in enacting that section.

The information which has been submitted in connection with Mr. "A's" application indicates that the profits derived by "Z" Company from participations in syndicates and selling groups, from selling concessions, and from the sale of securities owned by the company, are substantial, and although the Board does not have definite information as to the total income of the company, it appears that such transactions comprise one of its primary activities.

For the reasons discussed earlier in this letter, the Board does not feel that under these circumstances it may properly issue a permit covering the relationship described in Mr. "A's" application.

In the event that Mr. "A" desires to submit further facts or arguments in support of his application, the Board, as you know, is prepared to give them careful consideration. However, any additional facts or arguments should be submitted to you, in writing, as promptly as possible; and, in the event that he does not desire to submit any further facts or arguments, he should be requested to notify you as to what steps he takes to bring his relationships in to conformity with the provisions of the law.

Very truly yours,

(Signed) Chester Morrill

CHESTER MORRILL,

Secretary.

FEDERAL RESERVE BOARD,
February 14, 1935.

Mr. "R"
Acting Federal Reserve Agent,
Federal Reserve Bank of [City].

DEAR MR. "R": Consideration has been given to the application of Mr. "A" under the provisions of section 32 of the Banking Act of 1933 for a permit to serve as a director of the "X" Bank and as a general partner of "Z" and Company, both of [City], which you recommended be denied in view of the nature of the relationship involved.

It appears that "Z" and Company is engaged in the brokerage business as well as in distributing securities and trading on its own account. For the three-year period ending June 30, 1934, the income of the firm was $249,844.59. On the basis of the information submitted, it appears that, of this sum, $197,016.64 was derived from acting as broker on behalf of others; $8,068.90 from trading on its own account; $34,759.05 from the distribution of investment trust shares as member of a distributing group; and $10,000 from the distribution on a commission basis of stock of "M" Company, a local corporation, which was not underwritten by the firm.

It thus appears, on the basis of the information which has been submitted, that approximately 14% of the firm's total income for the three-year period was derived from distributing investment trust shares as member of a distributing group, and that such income together with the income received from trading on its own account and the distribution of the "M" Company stock, comprised approximately 21% of the firm's total income for the period.

Moreover, as stated in the Board's letter of July 16, 1934, the business of "Z" and Company is described as follows in Calvin Bullock's "Security Dealers of North America" (1934 edition):

> "Underwriters, Participating Distributors & Dealers in Govt., Municipal, Public Utility, Industrial, Investment Trust & Real Estate Issues Specializing in Investment Trust Securities; Stock Brokers; Members of Distributors Group, Inc."

From a statement in the preface to that book it appears that a questionnaire is sent every six months to each firm listed. It is assumed, therefore, that the foregoing excerpt is based on information furnished by "Z" and Company.

Under the circumstances, the provisions of section 32 are apparently applicable to the relationships described in the first paragraph of this letter.

As you know, the Federal Reserve Board believes that it was the intent of Congress in enacting section 32 to terminate all relationships of certain types between member banks and corporations engaged primarily in the business of purchasing, selling or negotiating securities, apparently because it felt that such relationships might tend to affect in a manner which Congress deemed to be incompatible with the public interest the banks' credit and investment policies and their advice respecting investments to their correspondent banks and other customers. Consequently, the Board believes that it may not properly grant permits authorizing relationships which appear to be actually of the kind referred to in that section and that its authority to issue such permits

should be exercised only in exceptional cases, such as those which are included within the literal terms of the statute but which are actually of a kind different from the relationships at which its provisions were directed. However, the relationship covered by Mr. "A" 's application is apparently within the class which the Board believes the section was designed to terminate and it is unable to find that it would not be incompatible with the public interest as declared by Congress to grant his application. Therefore, unless there are other circumstances which you believe should be considered by the Board, it is requested that you advise Mr. "A" accordingly.

In the event that Mr. "A" desires to submit further facts or arguments in support of his application, the Board, as you know, is prepared to give them careful consideration. However, any additional facts or arguments should be submitted to you, in writing, as promptly as possible; and, in the event that he does not desire to submit any further facts or arguments, he should be requested to notify you as to what steps he takes to bring his relationships into conformity with the provisions of the law.

Very truly yours,

(Signed) Chester Morrill

CHESTER MORRILL,

Secretary.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
February 8, 1936.

Mr. "R",
Federal Reserve Agent,
Federal Reserve Bank of [City].

DEAR MR. "R": Consideration has been given to your letter of January 23, 1936, in which you state that, on the basis of the additional information which has been submitted, you believe that Mr. "A", who deals in securities under the name of "A" & Company, [City], [State], is "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, of stocks, bonds, or other similar securities" and that he is therefore prohibited by section 32 of the Banking Act of 1933, as amended, from serving as a director of the "X" Bank.

The opinion of counsel for your bank, a copy of which you inclosed, reaches the same conclusion, pointing out that the information submitted by Mr. "A" shows that, in the conduct of his business, he purchases and sells securities as principal, and as agent for others, and also distributes securities "at retail under selling group agreements"; and that more than 50 per cent of his profits for each of the years 1931, 1932, and 1933, approximately 31 per cent of his profits for the year 1934, and approximately 46 per cent of his profits for the year 1935 were derived from the distribution of securities under selling group agreements.

As counsel for your bank points out, this information shows that the distribution of securities is one of Mr. "A"'s primary activities, and there-

fore the Board agrees with the conclusion reached by counsel for your bank that Mr. "A" 's service as a director of the national bank is prohibited by section 32 of the Banking Act of 1933. In the circumstances, it will be appreciated if you will advise the Board as to the steps which Mr. "A" takes in order to bring his relationships into compliance with the law.

Very truly yours,

(Signed) L. P. Bethea
L. P. BETHEA,
Assistant Secretary.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
September 25, 1936.

MR. "R",
Assistant Federal Reserve Agent,
Federal Reserve Bank of [*City*].

DEAR MR. "R": Receipt is acknowledged of your letter of September 14, 1936, requesting an opinion as to the applicability of section 32 of the Banking Act of 1933 to the services of Mr. "A" as a director of "X" Bank and as an employee of "Z" and Company, both of [City].

The Board sees no reason to differ with the conclusion reached by you and counsel for your bank that "Z" and Company should be deemed to be primarily engaged in the business referred to in section 32, and that the above relationships are, therefore, prohibited by that section.

Very truly yours,

(Signed) L. P. Bethea,
L. P. BETHEA,
Assistant Secretary.

NOTE: The information upon which the above conclusion was based was summarized in a memorandum to the Board from its Counsel reading as follows:

> The attached letter dated September 14, 1936, from Mr. "R", Assistant Federal Reserve Agent at [City], requests the opinion of the Board regarding the applicability of section 32 of the Banking Act of 1933, as amended, to the service of Mr. "A" as a director of "X" Bank of [City] and as an employee of "Z" & Co., both of [City].
>
> CONCLUSION
>
> The information submitted shows that section 32 is applicable.
>
> DISCUSSION
>
> Section 32 of the Banking Act of 1933 makes it unlawful for a director, officer or employee of a member bank to be at the same time a director, officer or employee of any corporation or partnership "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities".
>
> The information which has been submitted indicates that the income of "Z" & Co. is derived from four principal sources: (a) commissions from the execution of orders for the purchase and sale of securities, as brokers; (b) income from investments, and income from commercial paper interest and commissions; (c) income from trading in stocks and bonds and foreign exchange for own account; and (d) income from the kind of business

described in section 32. For the six months' period ending June 30, 1936, the last-named constituted 46 per cent of total gross income, the trading described under (c) above produced about 36 per cent, and the remaining 18 per cent was derived from the other sources described above.

The information submitted is well summarized in the following quotation from the memorandum of counsel for the Federal Reserve bank which accompanied the letter of the Federal Reserve agent:

"* * * it appears that the annual gross income derived by that firm from transactions of the kind specified in section 32 in the two-year period from December 31, 1932, to December 31, 1934, was not in excess of 4.58 per cent of the total gross income, and that in the same period the annual gross income received by the firm from stock brokerage transactions at no time constituted less than approximately 12 per cent of the total gross income; that in the period from December 31, 1934, to January 1, 1936, the gross income derived by the firm from transactions of the kind specified in section 32 constituted approximately one quarter of the total gross income for the year, while in the same period approximately one third of the firm's gross income was derived from trading in stocks and bonds for the firm's account; and, that gross income received by the firm from transactions of the kind specified in section 32 in the six-months period from January 1, 1936, to July 1, 1936, constituted approximately 46 per cent of gross income, while in the same period less than 40 per cent of the firm income was attributable to trading in stocks and bonds."

The word "primarily" is not defined in section 32 or in the Board's Regulation R. However, the Board has ruled in several cases that an organization was "primarily engaged" in the business described in section 32 when such business produced less than 50 per cent of the total income but where such business was one of the primary activities of the organization. In the light of the Board's previous rulings, therefore, there would seem to be no doubt but that section 32 is applicable to a director of a member bank who is an employee of "Z" & Co. A letter to this effect is submitted herewith.

One further matter may be mentioned. As indicated above, one of the activities of "Z" & Co. consists in handling commercial paper, and Mr. "A" states that his activities have been in this section of the firm. He says that he does not sell anything to the bank. However, the wording of section 32 and of the Board's Regulation R would not permit of a conclusion that section 32 was not applicable on this ground, and neither the Federal Reserve Agent nor the memorandum of counsel makes any reference to it.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
September 23, 1937.

Mr. "R,"
Vice President,
Federal Reserve Bank of [City].

DEAR MR. "R": Further reference is made to your letter of August 9, 1937, regarding the applicability of section 32 of the Banking Act of

1933 to Mr. "A," who is a director of "X" Bank and a special partner in the firm of "Z" and Company, both of [City].

The memorandum opinfon of counsel to your bank which you inclosed summarizes the information which you have received regarding the business of the firm and discusses the question whether it is "primarily" engaged in the types of business referred to in section 32. The information shows that the types of business described in that section produced 16.3 percent of the total gross income of the firm for the year 1935, 22.6 percent for the year 1936, and 17.1 percent for the first four months of 1937. The percentages for the years 1933 and 1934 were very much lower.

In discussing the question whether the figures for the later years should be regarded as more indicative of the nature of the business of the firm than the figures for the previous years, your counsel points out that the February 1, 1937 issue of the "Monthly Review of Credit and Business Conditions" published by your bank indicates that for the first year since 1930 offerings of domestic securities approximated normal volume in 1936, and therefore concludes that in the case of "Z" and Co., the figure of 22.6 for the year 1936 should be regarded as more truly indicative of the nature of the business of the firm than the figures for the previous years.

On the basis of these considerations your counsel reaches the conclusion, with which you agree, that "Z" and Co. should be regarded as now being "primarily engaged" in the types of business spec-

ified in section 32, and that therefore Mr. "A" may not legally continue to be at the same time a special partner in that firm and a director of "X" Bank. You are advised that the Board agrees with this conclusion.

Very truly yours,

(Signed) L. P. Bethea
L. P. BETHEA,
Assistant Secretary.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
November 1, 1937.

Mr. "R,"
Vice President,
Federal Reserve Bank of [*City*].

DEAR MR. "R": Consideration has been given to your letter of October 18, 1937, regarding the question whether section 32 of the Banking Act of 1933 would prevent Mr. "A," who is a partner in the firm of "Z" and Company, from serving at the same time as a director of "X" Bank. The question depends upon whether the firm is "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities" within the meaning of section 32.

The memorandum of counsel to your bank which you inclosed summarizes the information which you have received regarding the activities of the firm, and shows that syndicate participations and selling group commissions in connection with the flotation of new issues produced about 7.4 percent of the total gross income of the

firm. However, the memorandum shows that the firm also derives income from other transactions, in which it acquires large blocks of old securities and sells them to its clientele. The memorandum points out that in these transactions the firm does not enlist the services of salesmen or of associated firms, but merely notifies its clientele by telephone or circular letter that such securities are available at a stipulated price.

Section 32 was designed to prevent interlocking relationships involving the conflict of interests which would result from the service of an individual as a director of a bank, which was a potential purchaser of securities, and as a member of a firm which was seeking to promote the sale of such securities. The word "distribution" in section 32 clearly includes the distribution of new issues through selling group and syndicate participations. The wording and legislative history of the section show that it also includes so-called "secondary" distribution where the firm acquires a large quantity of an issue which has been outstanding for some time and distributes it to investors, because such "secondary distribution" involves a similar incentive to promote the sale of the securities.

In the present case, transactions of the latter kind produced about 12.7 percent of the total gross income of the firm, which, added to the amount derived from the distribution of new issues, constitutes such a substantial portion of the total income of the firm that the Board believes it should be regarded as "primarily" engaged in the kind of business described in section 32. Therefore, on the basis of the information which

has been submitted, it appears that the proposed service of Mr. "A" as a director of "X" Bank would be prohibited by the provisions of section 32 of the Banking Act of 1933.

It will be appreciated if you will advise Mr. "A" accordingly, unless you feel that a further investigation should be made of the facts regarding the sales of old issues by the firm or that there is some other reason why the matter should receive further consideration by the Board.

Very truly yours,

(Signed) L. P. Bethea
L. P. BETHEA,
Assistant Secretary.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
May 10, 1939.

Mr. "R",
Vice President,
Federal Reserve Bank of [*City*].

DEAR MR. "R": Receipt is acknowledged of your letter of May 3, 1939, enclosing copies of two letters from Mr. "A" with further reference to the applicability of section 32 of the Banking Act of 1933 to him.

The information submitted shows that for the three years 1936–1938 the business which he transacted as broker produced about 63 per cent of total gross income, and that sales for his own account produced about 37 per cent. He describes the latter type of business as comprising "the gross sales for my own account, which, you understand, were securities we were carrying." In a previous letter, he advised that he was carrying

an inventory of stocks, and also that he participated in syndicates, and retailed securities to the public. As explained in our letter of April 24, 1939 regarding this matter, this is the type of business referred to in section 32, and it constitutes one of his primary activities. Therefore, in harmony with the previous rulings of the Board in similar cases, section 32 should be deemed to be applicable to his services as director of the national banks.

It is assumed, of course, that Mr. "A" understands that the applicability of the statute depends simply upon a question of fact, namely, whether he is engaged in distributing and dealing in securities to such a substantial extent as to constitute one of his primary activities. If he is, the statute prevents his service as a director or officer of a member bank.

If Mr. "A" should feel that the facts have not been clearly understood, or that there are any additional facts or information which should be considered by the Board, the Board, of course, will be glad to give the matter further consideration.

Very truly yours,

(Signed) L. P. Bethea

L. P. Bethea,

Assistant Secretary.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
July 14, 1942.

Mr. "R",
Vice President,
Federal Reserve Bank of [*City*].

DEAR MR. "R": This refers to your letter of June 29 regarding the question whether Mr. "A" may continue to serve as a partner of "Z" & Company, and as a director of "X" Bank. You refer to the fact that in a letter to you dated June 12, 1936, the Board concurred in your opinion that on the basis of the facts then existing, "Z" & Company should not be regarded as "primarily engaged" in the business described in Section 32, but that in your letter replying to the inquiry regarding Mr. "A"'s eligibility, you pointed out that if there should be a material change in the character or relative volume of the various types of business transacted by the firm, a further question regarding the applicability of Section 32 might be presented.

You state that you have now been advised that during the intervening period, the proportion of the business of the kind described in Section 32 transacted by the firm is substantially larger than the proportion shown in 1936, and that it produced over 28 per cent of the aggregate gross income of the firm for the 6-year period ending April 1, 1942. In the circumstances, you informed Mr. "A" that the information submitted clearly indicated that "Z" & Company presently should be regarded as "primarily engaged" in the type of business described in Section 32, and that therefore he may not lawfully continue as a direc-

tor of a national bank while he continues his association with the firm.

As you know, the Board has considered a number of cases of this kind where the question was whether the type of business described in Section 32 was a sufficiently important part of the business of the firm to be regarded as one of its primary activities within the meaning of the statute. The facts shown in 1936 in connection with Mr. "A's" status at that time, presented a rather close question, but, as stated above, the Board saw no reason to differ with the conclusion reached by your bank. However, the Board agrees with you that on the basis of the information which has now been submitted regarding the nature of the business transacted by the firm during the 6-year period ending April 1, 1942, it is clear that the firm should now be regarded as "primarily engaged" in the type of business described in Section 32, and that Mr. "A" may therefore not lawfully continue as a director of the bank while he continues his association with the firm.

Very truly yours,

(Signed) L. P. Bethea

L. P. BETHEA,
Assistant Secretary.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
November 30, 1944.

Mr. "R,"
President, Federal Reserve Bank of [*City*].

DEAR MR. "R": This is in response to Mr. "Q's" letter of October 13, 1944, on the subject

of the application of section 32 of the Banking Act of 1933 to the continued service of Mr. "A" as a director of "X" Bank. Mr. "A", it appears, is also a partner in the firm of "Z" and Company. It is also clear that the firm of "Z" and Company engages in business of the kinds described in section 32, and your bank, following the precedents established by the Board in other cases, expressed the opinion to Mr. "A" and to "X" Bank that "Z" and Company is "primarily" so engaged within the meaning of section 32.

Mr. "M", president of the "X" Bank, questions the correctness of an interpretation of the word "primarily" which would result in the application of the statute to an interlocking relationship where the firm's business of the types described in section 32 does not constitute at least 50 percent of its total business. In these circumstances Mr. "M" wishes to arrange an interview in Washington.

The Board will be very glad to discuss the question further with Mr. "M" but, at the same time, believes that it is only fair that he should know in advance some of the factors which have influenced the Board in adopting the views heretofore expressed in other cases.

Section 32 is one of several measures enacted in 1933 designed to divorce commercial banking from investment banking. The general background of these provisions is fully and authoritatively discussed in Senator Bulkley's speech introducing the bill on May 10, 1932, reported in the Congressional Record beginning page 10222. In this speech Senator Bulkley described the

growth of the securities business in commercial banks and their affiliates, and the resulting conflicts of interest; he referred to the fact that commercial banks were not only in contact with prospective issuers of securities, but were also well situated to undertake the distribution of securities because of their relations with their correspondent banks; he referred to the use of lists of depositors as a means of distributing securities; and he referred to the rule of English and American jurisprudence that a trustee shall not sell to his trust. Certainly, the fact that 49 percent (as distinguished from 51 percent) of a firm's business happened to be underwriting would not, in itself, avert the consequences sought by the legislation.

It is a fact, of course, that one construction of the word "primarily" could lead in some cases to the adoption of a quantitative test such as Mr. "M" suggests. On the other hand, such is not the only accepted meaning of the word. It is frequently used in another sense. For instance, red is one of the "primary" colors but it is not the only primary color; Saturn is one of the "primary" planets but it is neither the only nor the largest one. Standard dictionaries cite as examples of the use of the word in the latter sense expressions similar to the expression "the *primary* causes of war".

The Board, in its prior considerations of the question, has always had in mind the rules of construction laid down by the courts that, while all of the words should be considered as having meaning, where a word used in a statute is susceptible of several meanings, that meaning should

be adopted which best accords with the intention of the legislature in enacting the statute and that a word used in a statute should not be construed to produce an absurd consequence when it is susceptible of another meaning in accord with the legislative intent. Under the quantitative test suggested by Mr. "M", underwriting could be one of the essential or fundamental parts of the company's business but, unless it constituted at least 50 per cent of the total, the business of the firm would not come within the scope of the statute. Presumably if the firm engaged in three types of business, each of which constituted a third of its total business, it would not be primarily engaged in any business. Indeed, in the light of the reduced amount of underwriting, in relation to the other types of business in which underwriting firms engage, which has taken place since the enactment of the statute, it might well be that there would be no firms to which section 32 would be applicable.

These are the circumstances which have caused the Board to construe the word "primarily" in a different sense from that suggested by Mr. "M". Moreover, while it has always looked at the sources from which a particular firm derives its operating revenue, it considers that factor as but one of all the factors. It also considers such factors as the purposes and functions of the organization, the business which it holds itself out as doing, and such other circumstances as may have a bearing upon the question.

Every interlocking relationship of the type described in section 32, of course, did not result in the consequences which the statute was designed

to prevent. However, it seems clear that Congress, in order to prevent such a consequence, directed its attention to the elimination of the relationships. Accordingly, while the Board is in sympathy with Mr. "M's" desire to retain experienced and qualified directors, it has not felt that it could properly construe section 32 in the manner he suggests.

As to a date for Mr. "M" to come to Washington, it is suggested that a mutually convenient date can best be arranged through your bank as intermediary. Please have Mr. "M" advised of the substance of this letter.

Very truly yours,

(Signed) Chester Morrill

CHESTER MORRILL,

Secretary.

FILE COPY

Office - Supreme Court, U. S.
APR 19 1946
CHARLES ELMORE CROPLEY
CLERK

No. 873 66

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1945~~ 1946.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.,

Petitioners,

vs.

JOHN AGNEW, F. O. FAYERWEATHER

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK J. DAVIES,
Paterson National Bank Bldg.,
Paterson, New Jersey.

HUGH H. OBEAR,
Southern Building,
Washington, D. C.
Attorneys for Appellants.

DAVIES & DAVIES,
DOUGLAS, OBEAR & CAMPBELL,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 973

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.,

Petitioners,

vs.

JOHN AGNEW, F. O. FAYERWEATHER

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents oppose the petition for a writ of certiorari and submit that there would appear to be no sound basis for its allowance in this case.

No conflict with decisions of other courts is shown to arise or exist with respect to the decision below. No failure to give proper effect to the applicable decisions of this court is demonstrated; and surely it cannot seriously be contended that the case presents a question of such grave importance as to justify the review by this court.

It is as true today as it was when the court decided *Magnum Import* v. *Coty* (1923) (262 U. S. 159, 67 L. Ed. 922) that:

> "The jurisdiction to bring up cases by certiorari from the circuit court of appeals was given for two purposes: First, to secure uniformity of decision be-

> tween those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort.' *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.*" (Italics supplied.)

The careful and well considered opinion of the court below (R. 29) sufficiently refutes all argument advanced by petitioners.

It should be emphasized, however, that this case does not present a question of judicial review of a finding or discretionary order of an administrative agency—but simply whether, as a matter of law, the agency has properly interpreted its own grant of power.

As the United States Court of Appeals for the District of Columbia clearly stated (R. 33-34):

> "The ultimate question before us is whether the interpretation of the statute by the Board, as the definition of a standard to be applied generally, is correct. That question is not one of fact. It is not even what one learned author calls 'a particularized conclusion', i.e., the exercise of judgment with respect to particular facts in determining the application of the statute. The question is a matter of law. We need not, therefore, attempt to thread our way through the confused and conflicting phases of the subject of judicial review which have puzzled both courts and students. On matters of law, unmixed, reviewing courts are free to substitute their own judgment for that of the administrator, although great weight must be given the administrative judgment. Consideration of a few recent decisions of the Supreme Court are sufficient to establish this conclusion. *Dobson* v. *Commissioner*, 320 U. S. 489, 64 S. Ct. 239, 88 L. Ed. 248 (1943); *Security Mills Co.* v. *Comm'r*, 321 U. S. 281, 64 S. Ct. 596, 88 L. Ed. 725 (1944); *Medo Corp.* v. *Labor Board*, 321 U. S. 678, 681-682, n. 1, 64 S. Ct. 830, 88 L. Ed. 1007 (1944).

For an earlier statement see *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 295, *et seq.*, 42 S. Ct. 477, 66 L. Ed. 943 (1922).

We conclude as to the scope of the power of the court that the construction of the statute, for violation of which the Board is authorized to remove from office directors of a bank, is essentially a judicial function, but that the construction given the statute by the Board is entitled to great weight and respect."

As this Court said in *Stark* v. *Wickard* (1944), 321 U. S. 288, 309-10, 88 L. Ed. 733, 748,

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."

For reasons herein stated and those stated in the opinion of the Court below it is respectfully submitted that the petition for writ of certiorari should be denied.

FRANK J. DAVIES
HUGH H. OBEAR
Attorneys for Respondent.

DAVIES & DAVIES,
DOUGLAS, OBEAR & CAMPBELL,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 18 1946
CHARLES ELMORE CROPLEY
CLERK

No. 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., PETITIONERS

v.

JOHN AGNEW, F. O. FAYERWEATHER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

FRANK J. DAVIES,
HUGH H. OBEAR,
Attorneys for Respondents.

DAVIES & DAVIES,
DOUGLAS, OBEAR & CAMPBELL,
Of Counsel.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

INDEX

	Page
Opinion below	1
Questions presented	1
Statutes involved	2
Statement	4
Summary of argument	7
Argument:	
I. District Court has jurisdiction to review	9
A. Where Board has exceeded statutory authority—may be enjoined	9
B. If no injunction lies, certiorari would seem to lie	14
II. Board exceeded authority in holding respondents were employees of a firm primarily engaged in the underwriting business	16
Interpretation of the words "primarily engaged"	16
Ordinary meaning of the words "primarily engaged"	16
A. Ordinary meaning not plainly at variance in statute as a whole	20
B. Plain meaning does not lead to absurd consequences	25
III. Unlawful delegation	28
Conclusion	29
Appendix	30

Cases

Adams v. *Nagle*, 303 U. S. 532	12, 13
Addison v. *Holly Hill Products*, 322 U. S. 607	8-13-16-26-28
American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94	8-1214
Columbia Broadcasting System v. *United States*, 316 U. S. 407	8-11
Degge v. *Hitchcock*, 229 U. S. 162	8-14 15
Estep v. *United States*, 327 U. S. 114	8-13

Page

Ex Parte Young, 209 U. S. 123, 159 8-13
Garfield v. *United States*, 211 U. S. 249, 262 7-10
Ickes v. *Fox*, 300 U. S. 82 (p. 97) 7-10
Noble v. *Union River Logging R. R.*, 147 U. S. 172 7-10
Panama Refining Co. v. *Ryan*, 293 U. S. 388, 421 (1935) 9-28
Philadelphia v. *Stimson*, 223 U. S. 605 7-9-14
Public Clearing House v. *Coyne*, 194 U. S. 497 15
Securities & Exchange Commission v. *C. M. Joiner Leasing Corporation*, 320 U. S. 344, 353 8-17-20
Skidmore v. *Swift*, 323 U. S. 134, 140 27
Social Security Board v. *Nierotko*, 90 L. Ed. (Adv. Sheets), 594, 601 8-14
Stark v. *Wickard*, 321 U. S. 288, 309-10 8-10-11-12
Switchmen's Union v. *National Mediation Board*, 320 U. S. 297 8-11
Viereck v. *United States*, 318 U. S. 236, 241, 243, 244 8-17

STATUTES

Agricultural Marketing Act of 1937 11
Banking Act of 1933:
Section 20 (48 Stat. 188, 12 U. S. C. § 377) 21-22-23-24
Section 21 (48 Stat. 189, 12 U. S. C. § 378) 21-22-23-24
Section 30 (c. 89, 48 Stat. 162-193, 12 U. S. C. § 77) 2-4-17
Section 32 (12 U. S. C. § 78) 2-3-4-7-16-24
48 Stat. 162, 12 U. S. C. § 221a 21-22

MISCELLANEOUS

1943 Annual Report to Speaker of House of Representatives, p. 35 26
Regulation R—Board of Governors of the Federal Reserve System—Appendix A (post p. 30) 26
Sen. Rep. No. 77, 73rd Congress, 1st Session, 1933 21
Black's Dictionary 17
Bouvier's Law Dictionary 17
Rapalje & Lawrence Dictionary 17
Webster's International Dictionary 17
Winston's Pocket Dictionary, 1941 ed. p. 307 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 66

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., PETITIONERS

v.

JOHN AGNEW, F. O. FAYERWEATHER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

Opinion Below

The opinion of the United States Court of Appeals (R. 20-37) is reported at 153 F. (2d) 785. No opinion was rendered in the United States District Court for the District of Columbia.

Questions Presented

1. Whether the District Court had jurisdiction to review the action of the Board of Governors of the Federal Reserve System in removing respondents as directors when

it is charged that the Board in so doing has exceeded the statutory authority conferred upon it.

2. Whether the Board exceeded its authority in holding that respondents were employed by a firm "primarily engaged" in the underwriting business, within the meaning of Section 32 of the Banking Act of 1933, as amended. (12 U. S. C. § 78).

Statutes Involved

Section 30 of the Banking Act of 1933, c. 89, 48 Stat. 162, 193, as amended (12 U. S. C. § 77), provides as follows:

> Sec. 30. Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in con-

ducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided,* That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court.

Section 32, as amended (12 U. S. C. § 78), provides:

Sec. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment polices of such member bank or the advice it gives its customers regarding investments.

Statement

On March 23, 1945, the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board) issued an order removing respondents as directors of The Paterson National Bank, Paterson, New Jersey (hereinafter referred to as the Bank) (R. 6-7). The order was issued pursuant to authority conferred upon the Board by Section 30 of the Banking Act of 1933, 48 Stat. 193 (12 U. S. C. § 77), which provides, *inter alia*, that if, following a hearing, the Board finds that an officer or director of a national bank has continued to engage in unsafe or unsound practices or to violate any law relating to such bank after having been warned by the Comptroller of the Currency to discontinue such practice or violation, the Board in its discretion may order that such officer or director be removed from office. The finding upon which the Board's order in this case was made was that respondents had continued to violate Section 32 of the Banking Act of 1933, as amended (12 U. S. C. § 78), after having been warned by the Comptroller of the Currency to discontinue such violation (R. 7-14).

Section 32 prohibits any officer, director or employee of any company, partnership or individual "primarily engaged" in the "underwriting" business from serving at the same time as an officer, director or employee of a national bank.

There are no disputed questions of fact.

Respondents were and are employees of Eastman Dillon & Co., a brokerage and securities house, having its principal place of business in New York City (herein sometimes called the Company). This firm, it was charged, was "*primarily engaged*" in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or

through syndicate participation, of stocks, bonds or other similar securities * * *".

It was not contended by petitioners or anyone else that the respondent directors had not performed their duties faithfully, nor could it have been. It was not contended that they had been guilty of any act which caused loss to the bank or its stockholders. It was not contended that they have used their position as directors for any ulterior or selfish purposes. Their removal revolves around the bald question of whether they were employees of a partnership *"primarily engaged"* in the "issue, flotation, under writing, public sale or distribution of stocks, bonds or similar securities."

The Board thereupon rendered its opinion (R. 8) wherein it stated: That there was no dispute as to the essential facts; that respondent Fayerweather had been a director of the bank since January 13, 1925, while respondent Agnew had been a director since November 27, 1934; that both respondents were elected directors at annual meetings of the shareholders of the bank held on January 13, 1942, January 12, 1943 and January 11, 1944, and that following these elections they took the appropriate director's oaths which were filed in the office of the Comptroller of the Currency.

The opinion and findings further showed that the total holdings of stock of the bank by the respondents and their families was approximately 1000 out of the total of 12,000 shares; that Mr. Fayerweather had been in the brokerage and securities business since about 1920, and that both he and Mr. Agnew had been employed by the firm of Eastman, Dillon & Co. since March, 1941, and were then employed at the office of that company in Paterson, New Jersey; that Eastman, Dillon & Co. then did no business with the bank and had not done any since the fall of 1941 when the bank disposed of all of its bonds other than United States govern-

ment bonds; that Eastman, Dillon & Co. does not deal in United States government bonds; and that since October, 1941, respondents have done no business with the bank other than a strictly brokerage commission business with its customers.

The company advertises its business as "Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities." For the fiscal year 1943, its gross income from the "underwriting field" (meaning the issue, flotation, underwriting, public sale or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds or other similar securities) amounted to 26 per cent of its gross income from all sources; and its gross income from the brokerage business (acting as agent in buying and selling for others) amounted to 42 per cent of its gross income from all sources. For the fiscal year ending February 29, 1944, its gross income from the "underwriting field" amounted to 32 per cent of its gross income from all sources; and its gross income from the brokerage business amounted to 47 per cent of its gross income from all sources. Considering the market value of the securities which were bought and sold by the firm as agent as well as those bought and sold by it for its own account during an indefinite period prior to September 20, 1943, that part lying within the "underwriting field" would represent about 15 per cent of the total market value. If one were to classify the total number of transactions during an indefinite period prior to September 20, 1943, it would be found that those in the "underwriting field" would amount to a similar percentage (15 per cent) of the total number. During the year 1943, the firm ranked ninth among 94 leading investment bankers of the country with respect to its total participations in underwritings of bonds. Excluding municipal and railroad bonds, its participations in under-

writings during 1943 amounted to $14,657,000. For a period during 1943 it ranked first among the underwriters.

Upon the basis of the foregoing findings of fact, the Board reached the "Conclusions of Law" that (R. 12-13):

> "The *only substantial question, and the one upon which this matter turns, is whether Eastman, Dillon & Co. was, at the times stated in the certificate of* the Comptroller of the Currency, '*primarily engaged* in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities' within the meaning of § 32 of the Act."

The Board concluded that Eastman, Dillon & Co. was primarily engaged in underwriting.

Respondents then sought from the District Court a writ of certiorari to the Board or in the alternative a mandatory injunction seeking to have the alleged illegal and unwarranted action of the Board set aside. The District Court dismissed the action, without opinion (R. 18-19). The United States Court of Appeals for the District of Columbia (hereinafter called the Court of Appeals) reversed, one judge dissenting. (R. 20-27).

Summary of Argument

I

This Court has repeatedly held that the courts have jurisdiction to review actions of administrative authorities where it is charged that the agency is acting in excess of its power—that it has not properly determined the extent of the authority given it by Congress. *Cf. Philadelphia* v. *Stimson*, 223 U. S. 605; *Ickes* v. *Fox*, 300 U. S. 82; *Noble* v. *Union River Logging R. R.*, 147 U. S. 172; *Garfield* v. *United States*, 211 U. S. 249.

The doctrine of *Stark* v. *Wickard*, 321 U. S. 288, rather than *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, is applicable here, especially as in the present case violation of the administrative order would subject the respondents to severe criminal penalties. *Cf. Securities and Exchange Commission* v. *C. M. Joiner Leasing Corporation*, 320 U. S. 344; *Ex parte Young*, 209 U. S. 123; *Estep* v. *United States*, 327 U. S. 114; *Viereck* v. *United States*, 318 U. S. 236.

The right involved need not be of statutory origin, *Cf. Columbia Broadcasting System* v. *United States*, 316 U. S. 407; it may be a common law right and the right to serve as a director, except as prohibited by the banking laws, is a common law right.

The National Banking System is not a more complete system or a more essential part of government than the administration of the Postal System, yet the Postmaster General may be enjoined if he acts beyond his authority. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. An agency may not properly interpret its own grant of power. This is a judicial function. *Addison* v. *Holly Hill Products*, 322 U. S. 607; *Social Security Board* v. *Nierotko*, 90 L. Ed. 594 (Adv. sheets).

If no relief in equity may be had certiorari should lie to review the action of the Board because it is (a) beyond its powers; (b) final; and (c) not reviewable otherwise. *Degge* v. *Hitchcock*, 229 U. S. 162.

II

The words of the statute "primarily engaged in underwriting" must be interpreted according to their ordinary meaning, unless such interpretation leads to absurd consequences or is plainly at variance with the policy of the legislation as a whole. *Cf. Addison* v. *Holly Hill Products*, 322

U. S. 607. The ordinary meaning of the words "primarily engaged" is definitely quantitative and mean "first". By no quantitative test shown in this record can the underwriting business be held to be first. The Board's effort to do this is by transposing the words of the statute "primarily engaged" to "primary" and then by adding to the word "primary" the phrase "one of the primary activities". This it may not do. The interpretation put by the court below upon the words "primarily engaged" are neither absurd nor are they plainly at variance with the purposes of the statute as a whole. On the contrary, they are in harmony with it.

III

Unless the words "primarily engaged" do not mean "first" in a quantitative sense, the Act constitutes an unlawful delegation of authority in that it furnishes no intelligible principle upon which the Board may act. *Cf. Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

ARGUMENT

I

The District Court had jurisdiction to review the action of the Board of Governors of the Federal Reserve System in removing respondents as directors when it is charged that the Board in so doing has exceeded the statutory authority conferred upon it.

A

This Court has so often said that the courts have jurisdiction: where "an officer, insisting that he has warrant under a statute, is transcending its bounds," (*Philadelphia* v. *Stimson*, 223 U. S. 605); where "the complainant did not ask the Court to interfere with the official

discretion of the Secretary * * *, but challenged his authority to do the things of which complaint was made." *Ickes* v. *Fox*, 300 U. S. 82 (at p. 97); where "If he (Secretary of Interior) has no power at all to do the act complained of, he is as much subject to injunction as he would be to a mandamus, if he refused to do an act which the law plainly required him to do; (*Noble* v. *Union River Logging R. R.*, 147 U. S. 172); that it seems unnecessary to multiply examples, though it might be well to recall the stirring words in *Garfield* v. *United States*, 211 U. S. 249, 262; that:

> "* * * there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

The right to this review would seem to be clearly within the above doctrine so often stated by the Court and recently repeated in *Stark* v. *Wickard*, 321 U. S. 288, 309-10, where the Court said:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."

Stark v. *Wickard, supra,* was a suit for injunction, filed in the District Court of the United States for the District of Columbia, against the Secretary of Agriculture. Plaintiffs were producers of milk. Plaintiffs complained that the Secretary, purporting to act under the Agricultural Marketing Act of 1937, had prescribed minimum prices to be paid to milk producers (plaintiff among them) from which he had deducted a specific amount for the benefit of milk co-operatives. Plaintiffs contended this was an interpretation that carried the Secretary's act beyond his statutory power.

The two lower courts held that the order was not reviewable on the ground that plaintiffs had no legally protected right entitling them to sue. This Court reversed this holding and in so doing showed the distinction between it and the *Switchmen's* case (*Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297) so strongly relied upon by petitioners. The Court considered that the producers had "a personal claim" which gave them standing to complain, while in the *Switchmen's* case "no personal right of employees, enforcible in the courts, was created."

The "rights" in *Stark* v. *Wickard* were those created by the statute. However, the right involved need not be of statutory origin. It may be a common law right. Cf. *Columbia Broadcasting System* v. *United States,* 316 U. S. 407. The right to serve as a director—except as *prohibited* by the banking laws, is a common law right. There could scarcely be a claim that Agnew and Fayerweather did not possess "personal rights" in the case.

The brief of the Board goes to great length to show that the banking system is "itself a complete system for the establishment and government of national banks",—

and "that no judicial review is provided by the statutes."[1] From this premise the deduction is apparently sought that its administrators are in effect "beyond the law" and that even if they "run wild" they may not be called to book, unless they are charged with fraud. The assertion logically leads to the proposition that they may (purporting to act under § 32) remove a director for any reason, and that their action in so doing could not be inquired into or restrained by any court. This is not and never has been the law.

So far as the "completeness" of the National Banking System is concerned, it surely could not be contended that the banking system is a more complete system or a more essential part of the government than the administration of post offices and post roads. Obviously it is even less so, for private capital and private endeavor are employed in the banking system, while the postal system is solely governmental. Yet the Postmaster General, if he assumes to act beyond the authority of the statute upon which he bases his act, may be enjoined from such illegal act. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

Adams v. *Nagle*, 303 U. S. 532, as pointed out by the court below (R. 25), has little similarity with the case before the Court. There the opinion dealt with the power of the Comptroller of the Currency to determine the sufficiency of assets upon which to base an assessment. It was claimed

---

[1] The statute in *Stark* v. *Wickard* made no provision for judicial review, but this Court said that even though there was

> "• • • no direct judicial review granted by this statute for these proceedings. • • • The authority for a judicial examination of the validity of the Secretary's action is found in the existence of courts and the intent of Congress as deduced from the statutes and precedents. • • • it was not to be lightly assumed that the silence of the statute bars from courts an otherwise justiciable issue."

that in so doing he had made a mistake of law in the interpretation of a contract. There was no question as to the scope of his authority, or of the interpretation of his statutory authority. As the Court of Appeals said none of the circumstances or considerations involved in that case are present here. Moreover, in the present case violation of the administrative order would subject the respondents to severe criminal penalties. Cf. *Ex parte Young* 209 U. S. 123, 159. *Estep* v. *United States*, 327 U. S. 114.

The construction of the statute, for violation of which the Board is authorized to remove from office the director of a bank, is essentially a question of law. In fact, petitioners concede that "the issue here is one of law." As pointed out by the Court of Appeals "in matters of law, unmixed, reviewing courts are free to substitute their own judgment for that of the administrator, although great weight must be given to administrative decisions." (R. 25)

We are not here concerned with judicial review of a finding or discretionary order of an administrative agency, as in *Adams* v. *Nagle*, but simply whether that agency is acting within the scope of the power granted by the statute. If it is acting *beyond* the authority granted then its action is illegal and the rights which are taken away are in violation of the citizens Constitutional privileges and immunities, and it may be restrained.

The real question presented by the case is, has the agency properly interpreted its own grant of power, and this court said in *Addison* v. *Holly Hill Products*, 322 U. S. 607:

> "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."

And again in *Social Security Board* v. *Nierotko*, 90 L. Ed. (Adv. Sheets) 594, 601:

> "An agency may not finally decide the limits of its statutory power. That is a judicial function."

B

If petitioners are correct in their assertion that even though the Board's action is beyond its statutory authority and that such action may not be corrected in a court of equity by granting appropriate relief, then a situation would be presented where issuance of a writ of certiorari to the Board would appear to be approprate. *Degge* v. *Hitchcock*, 229 U. S. 162;

Unquestionably the *Degge* case denies the right to the writ where it is sought merely to "review" an administrative order, but in a case where it is claimed that there has been a "ruling in excess of statutory power," and "there is no relief to be granted otherwise," the writ would seem appropriate.

First the opinion says:

> "Not being a judgment, in the sense of a final adjudication, the plaintiffs in error were not concluded by his decision, for had there been an arbitrary exercise of statutory power, or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity. *American School* v. *McAnnulty*, 187 U. S. 94. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620.
>
> "*The fact that there was this remedy* is itself sufficient to take the case out of the principle on which, at common law, right to the writ was founded. For there it issued to officers and tribunals only because there was no other method of preventing injustice." (Italics supplied)

Then the opinion proceeds to leave the door open on the applicability of the writ in an appropriate case for the court concludes the opinion by saying:

> "The writ of certiorari is one of the extraordinary remedies and being such it is impossible to anticipate what exceptional facts may arise to call for its use; but the present case is not of that character, but rather an instance of an attempt to use the writ for the purpose of reviewing an administrative order. *Public Clearing House* v. *Coyne*, 194 U. S. 497. This cannot be done."

From the court's language, it is seen that the writ is proper only where the "inferior tribunal has acted without jurisdiction or in disregard of the statutory provisions," and in such cases the writ runs "to boards, officers, tribunals and inferior judicatures whose findings and decisions, even though erroneous, have the quality of a final judgment; and there being no right of appeal or other method of review, the extraordinary writ of certiorari *was resorted to from necessity to afford a remedy where there would otherwise have been a denial of justice.*"

There can be no question that the opinion and order of the Board on removing respondents as directors was in a *quasi-judicial* proceeding and was final.

Respondents therefore assert that if no relief in equity may be had, certiorari should lie to review the action of the Board because it is (a) *beyond its powers;* (b) *final*, and (c) *not reviewable otherwise.* The foregoing circumstances *concurring*, the issuance of the writ would seem to be authorized under the authority of *Degge* v. *Hitchcock*, *supra.*

II

The Board exceeded its authority in holding that respondents were employed by a firm "primarily engaged" in the underwriting business, within the meaning of Section 32 of the Banking Act of 1933, as amended.[2]

The answer to the question depends upon the proper interpretation of the Statute to see *what power* Congress conferred on the Board. Manifestly the power to remove directors was not given "at will" but *only* if certain circumstances were found to be present, namely, that the directors be *"primarily engaged"* (or employees of a firm "primarily engaged") in the underwriting and sale of securities.

The rule is familiar that "words in a statute are to be given their *ordinary meaning,*" (unless such interpretation leads to "absurd consequences" or is "plainly at variance with the policy of the legislation as a whole," both of which aspects are considered hereinafter). As this court said in *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607,

> "* * * After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

There can scarcely be any sound dispute as to the *"ordinary meaning"* of the words "primarily engaged."[3] They are, we submit, definitely quantitative and mean "first", and by no quantitative test shown in the record can the underwriting business of respondents—employees of Eastman, Dillon & Co.—be held to be first. In volume, in

[2] 12 U. S. C. § 78.

income and in the number of transactions that firm's business was overwhelmingly brokerage.

The Board completely distorts the ordinary meaning of the words of the statute in order to achieve a result it wishes. It does this by transposing the words of the statute "primarily engaged" to "primary" and then by adding to the word "primary" the following: "*One of the primary activities*" (R. 13) (*Petitioner's brief*, 77, 84, 86).

This we must insist the Board may not do. This Court has said in *Viereck* v. *United States*, 318 U. S. 236, 241, 243, 244—a case arising under the statute requiring registration in the State Department of agents for foreign governments—that

> "• • • penal sanctions attach here[4] for wilful failure to file a statement • • •. Unless the statute, fairly read, demands the disclosure of the information

---

[3] The only definition of "primarily" given in dictionaries for "ordinary" use (e. g. Winston's Pocket Dictionary, 1941 ed. p. 307) is "in the first place". The word "primary" has only one legal definition. In Bouvier's Law Dictionary it is defined as "that which is first or principal"; in Black's "first", "chief", "principal", "leading"; in Rapalje & Lawrence's "first", "chief", "leading".

The very first definition of the word "primary" in Webster's International is "in the first place". As we all know "primary" is derived from the Latin "primus" meaning first. Numerous words derived from the root "primus" mean essentially *first* in their respective class, such as "primate"—first minister (a cleric), "prime minister"—first minister (civic head), "primer"—first reader, "primogeniture"—first born. "Primarily" is of course used in contradistinction to secondarily. There cannot be two "firsts". One can say "I read the first two pages of a book," but one cannot say "I read the two first pages."

[4] (a) Penal sanctions likewise attach in the instant case. § 30 provides:

"• • • Any such director • • • removed from office • • • who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or *both*, in the discretion of the court."

(b) Cf. *Securities & Exchange Commission* v. *C. M. Joiner Leasing Corporation*, 320 U. S. 344, 353.

which petitioner failed to give, he cannot be subjected to the statutory penalties."

* * * * * * *

"* * * In neither case does the statute command, or authorize the Secretary to command, registrants to make any statement of their activities other than those in which they have engaged 'as agent'.

We cannot read that phrase as though it had been written 'while an agent' or 'who is an agent'. The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem.

* * * While Congress undoubtedly had *a general purpose to regulate agents* of foreign principals in the public interest by directing them to register and furnish such information as the Act prescribed, we cannot add to its provisions other requirements merely *because we think they might more successfully have effectuated that purpose.*" (Italics supplied.)

Analysis of the language of the statute and disclosure of the Board's fallacy in arriving at its "conclusion of law" are splendidly stated in the opinion of the court below (R. 26-27):

> "The Board says that the phrase "primarily engaged" has two possible meanings. Its premise is that the word "primary" has two possible meanings, one being a quantitative meaning and the other the meaning which the word has in expressions such as "the primary colors," "one of the primary planets," "the primary causes of war," and "a matter of primary importance." It says that the latter meaning accords with the legislative intent and, further, that the former leads to absurd results. It, therefore, adopts the latter meaning and concludes that, as a

matter of law, Eastman, Dillon & Co. was primarily engaged in underwriting within the meaning of the statute.

It is true that the adjective "primary" has different shades of meaning, but always its basic idea is "first". It may refer to the first in order of time, and thus mean original or initial; or in order of importance, and thus mean chief or principal; or in order of derivation, and thus mean fundamental. Its synonyms are "prime" and "primeval". Its antonyms are "secondary" and "lesser". The difference which the Board senses, but does not state, is that "primary" is not restricted to the singular; it may refer to a plural. Thus, the primary colors are not one but several; and so with the planets and the causes of war. An activity may be either *a* primary activity or *the* primary activity of a given person. The adverb "primarily" has similar shades of meaning. The Board's interpretation is, in effect, that "primarily engaged" as it occurs in this statute encompasses all the important activities of a concern; that it means "a" primary activity, not merely "the" primary activity.

But "primary" when applied to a single subject always means first, or chief, or principal. A concern's "primary activity" is never one of several; it is always the first, or chief, or principal, activity. And so it is with "primarily". When applied to a single activity, as it is to underwriting in the case at bar, it always means the first, or chief, or principal, activity. One would never say that a person is "primarily concerned" or "primarily interested" or "primarily engaged" in a specified single activity, if the idea sought to be conveyed was that the named activity was a lesser among several important activities. To say that such an expression conveys that idea is, we think, clearly erroneous.

In its brief, the Board epitomizes its position by saying, "Undoubtedly, then, Eastman, Dillon & Co. are 'fundamentally' or 'primarily' engaged in both the brokerage business and the underwriting business. To put it otherwise, underwriting is one of the busi-

nesses in which the firm is 'primarily' engaged." The latter sentence makes plain the error of law of the Board. It is true that the word "primary" may be applied to a plurality of items in order to distinguish that group from still others as secondary. But this does not answer the question which is posed by the statute. That problem is to ascertain whether the designated concern is primarily engaged in a single, named activity, *i.e.*, underwriting. That problem is not solved by finding that the concern is primarily engaged in a group of several activities, in contradistinction to still other lesser activities, and then concluding that the concern is primarily engaged in each separate activity in the first group. That process would lead to the conclusion that an activity which, standing by itself is by every standard less than another, is, nevertheless, primary. Such a conclusion is simply not true. The activity in which the concern is in fact secondarily engaged cannot be made its primary engagement by a process of reasoning which includes a fallacy of division".

(a) *Ordinary meaning not plainly at variance with the statute as a whole.*

Nothing in the legislative history of the act either requires or justifies a different construction, particularly a construction which would leave vague and indeterminate the extent of the activity which would render the director ineligible and subject him to severe criminal penalties if he should disregard the administrative order.[5]

As pointed out in the opinion below, and as appears from their brief, petitioners purport to derive comfort for their position from the provisions of the banking act relating to the separation of "affiliates" from "member banks", *Sec-*

[5] The statute whether it be regarded as "penal" as respondents have contended, or "remedial" as petitioners insist it is, should be *fairly* construed. Cf. *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corporation*, 320 U. S. 344, 353.

tion 20—(48 Stat. 188, 12 U. S. C. A. § 377)[6] and *Section 21* (48 Stat. 189, 12 U. S. C. A. § 378)[7] of the Banking Act and the Senate Committee Report upon the bill which became the Banking Act of 1933. (*Sen. Rep. No. 77, 73rd Congress*, 1st Session, 1933).

The Board relied upon the phrase in the report "to separate as far as possible * * * member banks from affiliates of all kinds."

But "affiliates" had been defined by the bill. In substance an "affiliate" was a corporation in which the member bank held *a majority* of the shares voted for the election of directors; or of which control is held by shareholders of a member bank who own or control either a majority of the shares of the bank or *more than 50 per cent* of the shares voted for the election of directors.[8]

---

[6] "SEC. 20. After one year from the date of the enactment of this Act, no member bank shall be affiliated in any manner described in section 2 (b) hereof with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stock, bonds, debentures, notes, or other securities: *Provided*, That nothing in this paragraph shall apply to any such organization which shall have been placed in formal liquidation and which shall transact no business except such as may be incidental to the liquidation of its affairs."

[7] A related section to Section 20 was Section 21 (12 U. S. C. A. § 378) which provided that after one year it should be unlawful for any organization "engaged in the business of * * * underwriting * * * to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor."

[8] 48 Stat. 162, 12 U. S. C. A. § 221a. The Act said:

"As used in this chapter—

"* * *

"(b) Except where otherwise specifically provided, the term 'affiliate' shall include any corporation, business trust, association, or other similar organization—

"(1) Of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors,

The suggestion had been made, so the Report said, that the affiliate system be "abolished". The Committee, however, did not deem it advisable to take this step. Congress decided upon a qualified prohibition.

The separation of affiliates from banks was thus a very qualified one—and one depending upon a distinctly *quantitative test.*

As to the Board's contention with respect to the influence of Sections 20 and 21, the Court below said:

> "One of the principal sections designed to attain these purposes is section 20 of the Act, which provides that no member bank shall be affiliated 'in any manner' with any company 'engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.'"

But the Act does not read as the Board quotes it. It does not say "that no member bank shall be affiliated 'in any manner' with any company," etc. It says, "no member bank shall be affiliated in any manner *described in subsection (b) of section 221a of this title* with any corporation," etc. (Italics supplied.) The subsection mentioned is the definition of affiliates which we have just discussed. Thus, Section 20, in full text, prescribes dissolution of control only,

---

trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or

"(2) Of which control is held, directly or indirectly, through stock ownership or in any other manner, by the shareholders of a member bank who own or control either a majority of the shares of such bank or more than 50 per centum of the number of shares voted for the election of directors of such bank at the preceding election, or by trustees for the benefit of the shareholders of any such bank; or

"(3) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one member bank."

and not the complete divorcement indicated by the partial quotation relied on by the Board. There is a vast difference.

Thus, it is plain that the Committee Report and the section of the Act from which the Board says we must derive the intent of Congress, do not prescribe the complete divorcement which the Board urges, but, quite the contrary, direct only a dissolution of control. In each provision of the definition of the prohibited affiliation, the line is drawn at the majority. Forty-nine per cent is permissible. Fifty-one per cent is prohibited. This is a quantitative test. If, as the Board says, we are to ascertain the intent of Congress by these references, we reach the clear conclusion that Congress intended to apply a quantitative test in its prohibition.

As to Section 21 of the Act, the Board says, in its brief in this Court:

> "Section 21 is complementary to section 20 and, among other things, prohibits any company which is engaged in the underwriting business from engaging 'at the same time to any extent whatever in the business of receiving deposits . . .'"

This section of the Act, prohibiting dealers in securities from engaging in the banking business, contains two expressions pertinent to the present inquiry. Congress here used the phrase "engaged in the business"—not "primarily engaged," or "principally engaged," but simply "engaged". It added the emphatic phrase "to any extent whatever". These words prescribe complete separation. When Congress meant complete separation, it said so, in this same Act, in unmistakable terms. It knew what terms to use, and used them.

We do not know why Congress, in separating member banks from outside interests, went only so far as to prohibit control. We do not know why it rested its prohibition upon the precise line of majority. We only know that it did so.

And the fact that it did so seems to indicate that when it used the term "primarily engaged" in Section 32 of the Act, as contrasted with "engaged" and "engage at the same time to any extent whatever" in Section 21, it had in mind a chief or principal business as measured by a quantitative test.

When Section 32 was originally enacted in 1933 there was no attempt to follow the wording of Section 20 (*engaged principally* in the issue, flotation, underwriting, public sale, etc.) or of Section 21 (*engaged* in the business • • • of underwriting, etc.). The language of Section 32 originally was "*engaged primarily* in the business of purchasing, selling or negotiating securities".

Under the original act directors might serve only if permitted to do so by the Board by permit in the particular case.

In 1935 Congress amended § 32 in several respects: (1) It did away with the exceptions by permit in particular cases and substituted the provision that the Board might allow such service "by general regulations"; (2) It expanded the provisions to include "employees" as well as officers and directors so as to include individuals engaged in the securities business, and (3) it changed the wording to phraseology similar to that found in Section 20 descriptive of investment banking—that is similar in all respects save the very important one that it again used the term "*primarily*" instead of "principally". This would seem to show that Congress had no intention of disqualifying as an officer, director or employee of a member bank any one who is interested in some similar capacity in another business so conducted that the underwriting or securities business that it did was subordinate or incidental to its main activity, whether such main activity be brokerage, insurance or any other business.

The Board's brief says (p. 39) the Board's interpretation provides a "much more stable and less variable formula" that that adopted by the Court below. Respondents insist the situation is just the reverse. Can anyone reading the Board's several rulings set forth in its appendix have the faintest idea in the world of *how much* investment security activity would be subject to condemnation? The only invariable deduction one can make is that if the director does any securities business *at all*—he will receive the Board's condemnation. On the other hand, under the Court's interpretation he would know, as a mathematical certainty, when his activity violated the statutory prohibition.

The words used in the statute simply do not "produce an unreasonable result", "plainly at variance with the policy of the legislation as a whole".

(b) *Plain meaning does not lead to absurd consequences.*

The Board says that when the plain meaning of a statute produces absurd results or is plainly contrary to the policy of the legislation as a whole, an interpretation at variance with the plain meaning is permissible.

This is, of course, true, but there must be *real* "absurdity" and not merely an imagined "absurdity"—real "conflict" with the purposes of the statute and not a fanciful conflict. The absurdity may not consist merely in a viewpoint at variance with petitioners' own idea of what it would like to have the statute mean, or even what it believes would be best for the administration of the act. Where is any absurd result in the instant situation? There is nothing absurd in providing that a director may not serve if his underwriting business is more than 50 per cent of his other business. Not *all* directors selling securities were to be put under the ban, but only those "primarily engaged, etc." Why shouldn't Congress have provided

a definite and mathematical yardstick by which the underwriting activity, fraught with important consequences, should be measured?[9] Congress might well have and no doubt did consider that to deprive the bank of the benefit of *all* counsel and advice from experienced and well qualified brokers and investment bankers on their boards was undesirable—and hence fixed the standard which it did—that they must be *primarily engaged* in the underwriting field. In any event, if Congress had wished to make *all* engagements in business of buying, selling or negotiating securities, or even those whose underwriting activities which though secondary were important, a bar to serving on a bank directorate, it surely would have had little difficulty in saying so—and with equal certainty would not have used the words it did. When Congress, in this same banking act, wished to prescribe complete separation, it had no difficulty in expressing its will.

Does not this seem far less "absurd" than the position of the Board—that under the phrase "primarily engaged" it may find that underwriting to any degree from zero to fifty per cent constitutes a violation of the statute? Is this not the sort of "roving commission" that Mr. Justice Roberts condemned in his concurring opinion in the *Holly Hill* case (*supra*)? Yet the Board has gone so far as to indicate that if a broker did *any* underwriting he would be ineligible for a directorship,[10] and has said that under § 32

---

[9] The desirability of a fixed yardstick in connection with a "holding company affiliate" was appreciated by the Board—for in its 1943 Annual Report to the Speaker of the House of Representatives it used this language (p. 35):

> "Moreover, regulation, to be effective, must have continuity, and a statutory yardstick under which a company may be a bank holding company one year and may not be the next year renders regulation difficult if not impossible in some important instances."

[10] See Regulation R—*Board of Governors of the Federal Reserve System*—Appendix "A", (post, p. 30).

"*all* relationship between member banks and 'dealers in securities' should be terminated." (Petitioner's Brief—Appendix 65, 71, 80).

Congress certainly never indicated any such viewpoint and quite definitely had in mind a *degree* of activity which would bring the director within the ban of the statute. This is clearly and necessarily quantitative. He could be removed *if* engaged in underwriting to a certain extent. To what extent? Primarily—first.—And the underwriting business of Eastman, Dillon & Co. was not first.

(c) *Interpretation by the Board as shown in Petitioners' Appendix to Brief.*

The appendix to the Board's brief consisting of numerous rulings from July, 1934 to November 30, 1944, is quite illuminating. These letters demonstrate the wholly arbitrary and unreasonable interpretation by the Board of its own powers.

A construction locked within the Board's breast unknown to Congress, to the Courts, to the People, can hardly serve as a basis for a contention that it is a "settled rule" of interpretation long "acquiesced in"—and hence entitled to respect on that account.

Respondents do not dispute the fact that the opinion of the Board is entitled to great respect and such respect and consideration were given by the Court below, but as pointed out by this Court in *Skidmore* v. *Swift*, 323 U. S. 134, 140 (cited by petitioners upon this point):

> "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, *the validity of its reasoning*, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Surely there is nothing in the reasoning displayed in this correspondence (Petitioners' Appendix) calculated to persuade one of the soundness of the Board's position. Rather, it is a striking example of autocratic attitude and bureaucratic power. The Board seems determined to "carry its point"—viz—that it has the right to prohibit the director from serving if he engages in the sale of *any* stocks, bonds or similar securities except United States Government obligations.

Did Congress mean to grant to the Board any such *power? We submit the answer is no.*

III

Unlawful Delegation

If the words "primarily engaged" do not mean *"first"* in a quantitative sense, as contended by respondents, the act constitutes an unlawful delegation of authority in that it furnishes no intelligible principle upon which the Board may act. There are no standards—there is no yardstick.

Panama Refining Co. v. *Ryan*, 293 U. S. 388, 421. (1935).

As Mr. Justice Roberts said in his separate concurring opinion in the *Holly Hill* case (*supra*):

> "If Congress, when it said that the area of production should be defined by the Administrator, meant that that official should have a roving commission to create exemptions from the act, the entire provision must fall as an unconstitutional attempt to delegate legislative power."

And as a practical matter the Board itself has not applied any yardstick. (See Appendix to Petitioner's brief).

Conclusion

For reasons herein stated and those stated in the opinion of the Court below it is respectfully submitted that the judgment of the Court below should be affirmed.

FRANK J. DAVIES,
HUGH H. OBEAR,
Attorneys for Respondent.

DAVIES & DAVIES,
DOUGLAS, OBEAR & CAMPBELL,
Of Counsel.

APPENDIX A

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Relationships With Dealers in Securities under Section 32 of the Banking Act of 1933

Regulation R

This regulation as printed herewith is in the form as revised effective January 4, 1936

Inquiries Regarding This Regulation

Any inquiry relating to this regulation should be addressed to the Federal Reserve Agent at the Federal Reserve bank of the district in which the inquiry arises.

(Superseding Regulation R of 1933)

Statutory Provisions

This regulation is based upon and issued pursuant to the provisions of section 32 of the Banking Act of 1933, which is published in the Appendix hereto.

Section 1. Prohibitions

Under section 32 of the Banking Act of 1933, except as hereinafter stated in section 2, no officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, can legally be at the same time an officer, director, or employee of any member bank of the Federal Reserve System.[2]

---

[2] Therefore, by its terms, section 32 does not apply—

(a) To a person who is not an officer, director, or employee of a member bank of the Federal Reserve System;

(b) To a person (1) who is not an officer, director, or employee of a corporation or unincorporated association primarily engaged in the issue,

Section 2. Exceptions

Pursuant to the authority vested in it by section 32, the Board of Governors of the Federal Reserve System hereby permits the following relationships:[3]

Any officer, director, or employee of any corporation or unincorporated association, any partner or employee of any partnership, or any individual, not engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of any stocks, bonds, or other similar securities except bonds, notes, certificates of indebtedness, and Treasury bills of the United States, obligations fully guaranteed both as to principal and interest by the United States, debentures issued by Federal Intermediate Credit banks, bonds issued by Federal Land banks, and general obligations of Territories, dependencies and insular possessions of the United States, may be at the same time an officer, director, or employee of any member bank of the Federal Reserve System, except when otherwise prohibited.[4]

---

flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation of stocks, bonds, or other similar securities, (2) who is not a partner or employee of a partnership primarily so engaged, and (3) who is not, in his individual capacity, primarily so engaged.

A broker who is engaged solely in executing orders for the purchase and sale of securities on behalf of others in the open market is not engaged in the business referred to in section 32.

[3] Under section 32, as amended effective January 1, 1936, the Board is authorized to except limited classes of relationships from the prohibitions of the statute, under certain conditions; but the Board can make such exceptions only by general regulations and is not authorized to issue individual permits.

[4] Section 8 of the Clayton Act is applicable in certain circumstances to interlocking relationships between member banks and private bankers, and other banks, banking associations, savings banks and trust companies. See Regulation L of the Board of Governors of the Federal Reseve System.

Section 17(e) of the Public Utility Act of 1935 is applicable in certain circumstances to interlocking relationships between banks and private bankers (and corporations owned by banks and private bankers), and public utility companies and public utility holding companies. Inquiries regarding this section should be addressed to the Securities and Exchange

Section 3. Amendments

The right to alter, amend, or repeal this regulation, in whole or in part, is expressly reserved.

Statutory Provisions

Section 32 of the Banking Act of 1933 (U. S. C., Title 12, sec. 78), as amended by section 307 of the Banking Act of 1935, effective January 1, 1936, reads as follows:

> Sec. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual (primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities), shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.

Commission and not to the Board of Governors of the Federal Reserve System.

Section 305(b) of the Federal Power Act is applicable in certain circumstances to interlocking relationships between public utility companies and banks and bankers that are authorized by law to underwrite or participate in the marketing of securities of a public utility. Inquiries regarding this section should be addressed to the Federal Power Commission and not to the Board of Governors of the Federal Reserve System.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1946.

Board of Governors of the Federal Reserve System et al., Petitioners,
v.
John Agnew, F. O. Fayerweather.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 6, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

This case, here on certiorari to the Court of Appeals of the District of Columbia, presents important problems under § 30 and § 32 of the Banking Act of 1933, 48 Stat. 162, 183, as amended, 49 Stat. 704, 709, 12 U. S. C. §§ 77, 78.

Section 30 of the Act provides that the Comptroller of the Currency, whenever he is of the opinion that a director or officer of a national bank has violated any law relating to the bank, shall warn him to discontinue the violation and, if the violation continues, may certify the facts to the Board of Governors of the Federal Reserve System. The Board is granted power to order that the director or officer be removed from office if it finds after notice and a reasonable opportunity to be heard that he has continued to violate the law.[1]

[1] Section 30 also provides:
"That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court."

Section 32 of the Act prohibits, *inter alia*, any partner or employee of any partnership "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities" from serving at the same time as an officer, director, or employee of a member bank.[2]

Pursuant to the procedure outlined in § 30 the Board ordered respondents removed from office as directors of the Paterson National Bank on the ground that they were employees of a firm "primarily engaged" in underwriting within the meaning of § 32. Respondents brought suit in the District Court for the District of Columbia to review the action of the Board or to enjoin its action. The District Court dismissed the complaint. The Court of Appeals reversed by a divided vote, holding that the Board exceeded its authority and that an injunction should issue. 153 F. 2d 785.

First. The Board contends that the removal orders of the Board made under § 30 are not subject to judicial review in the absence of a charge of fraud. It relies on the absence of an express right of review and on the nature of the federal bank supervisory scheme of which § 30 is an integral part. Cf. *Adams* v. *Nagle*, 303 U. S. 532; *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297; *Estep* v. *United States*, 327 U. S. 114. A majority of the Court, however, is of the opinion that the determination of the extent of the authority granted the Board to issue removal orders under § 30 of the Act is subject to judicial review and that the District Court is authorized to enjoin the

[2] Not material here is an exception "in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments." § 32.

removal if the Board transcends its bounds and acts beyond the limits of its statutory grant of authority. See *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620; *Stark* v. *Wickard*, 321 U. S. 288, 309–310. That being decided, it seems plain that the claim to the office of director is such a personal one as warrants judicial consideration of the controversy. Cf. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; *Stark* v. *Wickard*, *supra*, p. 305.

Second. We come then to the merits. Respondents for a number of years have been directors of the Paterson National Bank, a national banking association and a member of the Federal Reserve System. Since 1941 they have been employed by Eastman, Dillon & Co., a partnership, which holds itself out as being "Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities." During the fiscal year ending February 28, 1943, its gross income from the underwriting field [3] was 26 per cent of its gross income from all sources, while its gross income from the brokerage business was 42 per cent of its gross income from all sources. The same percentages for the fiscal year ending February 29, 1944, were 32 per cent and 47 per cent respectively; and for the period from March 1, 1944, to July 31, 1944, 39 per cent and 40 per cent respectively. Of the total number of transactions, as well as the total market value of the securities bought and sold by the firm as broker and as dealer for an indefinite period prior to September 20, 1943, about 15 per cent were in the underwriting field. The firm is active in the underwriting field, getting what business it can. In 1943 it ranked ninth among 94 leading investment bankers in the country with respect to its total participations in

[3] The issue, flotation, underwriting, public sale or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds or other similar securities. The firm does not deal in United States Government bonds.

underwritings of bonds. For a time during 1943 it ranked first among the underwriters of the country. Apart from municipals and rails, its participation in underwritings during 1943 amounted to $14,657,000. Since October, 1941, respondents have done no business with the bank other than a strictly commission business with its customers. Nor has the firm done business with the bank since the fall of 1941.

These are the essential facts found by the Board.

On the basis of these facts the Board concluded that during the times relevant here Eastman, Dillon & Co. was "primarily engaged" in the underwriting business and that respondents, being employees of the firm, were disqualified from serving as directors of the bank.

The Court of Appeals concluded that when applied to a single subject "primary" means first, chief, or principal; that a firm is not "primarily engaged" in underwriting when underwriting is not by any standard its chief or principal business. Since this firm's underwriting business did not by any quantitative test exceed 50 per cent of its total business, the court held that it was not "primarily engaged" in the underwriting business within the meaning of § 32 of the Act.

We take a different view. It is true that primary" when applied to a single subject often means first, chief, or principal. But that is not always the case. For other accepted and common meanings of "primarily" are "essentially" (Oxford English Dictionary) or "fundamentally" (Webster's New International). An activity or function may be "primary" in that sense if it is substantial. If the underwriting business of a firm is substantial, the firm is engaged in the underwriting business in a primary way though by any quantitative test underwriting may not be its chief or principal activity. On the facts in this record we would find it hard to say that underwriting was not one primary activity of the firm and brokerage another. If

"primarily" is not used in the sense we suggest then the firm is not "primarily engaged" in any line of business though it specializes in at least two and does a substantial amount of each. One might as well say that a professional man is not "primarily engaged" in his profession though he holds himself out to serve all comers and devotes substantial time to the practice but makes the greater share of his income on the stock market.

That is the construction given the Act by the Board. And it is, we think, not only permissible but also more consonant with the legislative purpose than the construction which the Court of Appeals adopted. Firms which do underwriting also engage in numerous other activities. The Board indeed observed that if one was not "primarily engaged" in underwriting unless by some quantitative test it was his principal activity, then § 32 would apply to no one. Moreover, the evil at which the section was aimed is not one likely to emerge only when the firm with which a bank director is connected has an underwriting business which exceeds 50 per cent of its total business. Section 32 is directed to the probability or likelihood, based on the experience of the 1920's, that a bank director interested in the underwriting business may use his influence in the bank to involve it or its customers in securities which his underwriting house has in its portfolio or has committed itself to take. That likelihood or probability does not depend on whether the firm's underwriting business exceeds 50 per cent of its total business. It might, of course, exist whatever the proportion of the underwriting business. But Congress did not go the whole way; it drew the line where the need was thought to be the greatest. And the line between substantial and unsubstantial seems to us to be the one indicated by the words "primarily engaged".

There is other intrinsic evidence in the Banking Act of 1933 to support our conclusion. Section 20 of the Act

outlaws affiliation [4] of a member bank with an organization "engaged principally" in the underwriting business. Section 19 provides control over bank holding companies. In order to vote its stock in controlled banks a bank holding company must show that it does not own, control, or have any interest in, and is not participating in the management or direction of any organization "engaged principally" in the underwriting business. On the other hand, when Congress came to deal with the practice of underwriters taking checking deposits, it used language different from what it used either in §§ 19 and 20 on the one hand or in § 32 on the other. By § 21 it prohibited any organization "engaged" in the underwriting business "to engage at the same time to any extent whatever" in the business of receiving checking deposits. Thus within the same Act we find Congress dealing with several types of underwriting firms—those "engaged" in underwriting, those "primarily engaged" in underwriting, those "engaged principally" in underwriting. The inference seems reasonable to us that Congress by the words it chose marked a distinction which we should not obliterate by reading "primarily" to mean "principally".

The Court of Appeals laid some stress on the fact that Congress did not abolish the bank affiliate system but only those underwriter affiliates which were under the control of a member bank or which were under a common control with it.[5] Section 20. Since Congress made majority control critical under § 20, it was thought that under § 32 a firm was not "primarily engaged" in underwriting unless underwriting constituted a majority of its business. But the two situations are not comparable. In § 32 Con-

[4] Defined in § 2 (b) as direct or indirect ownership or control of more than 50 per cent of the voting stock of the organization in question, common ownership or control of 50 per cent or more of such voting stock, or a majority of common directors.

[5] See note 4, *supra*.

gress was not dealing with the problem of control of underwriters by banks or *vice versa*. The prohibited nexus is in no way dependent on the presence or absence of control, nor would it be made so even if "primarily engaged" in underwriting were construed to mean principally engaged in that business. Section 32 was designed, as we have said, to remove tempting opportunities from the management and personnel of member banks. In no realistic sense do those opportunities disappear merely because the underwriting activities of the outside firm with which the officer, director, or employee is connected happens to fall below 51 per cent. Fifty-one per cent, which is relevant in terms of control, is irrelevant here. The fact then that Congress did not abolish underwriter affiliates serves as no guide in determining whether "primarily engaged" in underwriting as used in § 32 means principally engaged or substantially engaged in that business.

Section 32 is not concerned, of course, with any showing that the director in question has in fact been derelict in his duties or has in any way breached his fiduciary obligation to the bank. It is a preventive or prophylactic measure. The fact that respondents have been scrupulous in their relationships to the bank is therefore immaterial.

There is a suggestion that if "primarily" does not mean principally but merely connotes substantiality, § 32 constitutes an unlawful delegation of authority to the Board. But we think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or ascertainable so as to survive challenge on the grounds of unconstitutionality. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 397–400; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 142–146; *Yakus* v. *United States*, 321 U. S. 414, 424–428; *Bowles* v. *Willingham*, 321 U. S. 503, 512–516.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1946.

Board of Governors of the Federal Reserve System et al., Petitioners, v. John Agnew, P. O. Fayerweather.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 6, 1947.]

Mr. Justice Rutledge, concurring.

If the question presented on the merits is reviewable judicially, in my opinion it is only for abuse of discretion by the Board of Governors. Not only because Congress has committed the system's operation to their hands, but also because the system itself is a highly specialized and technical one, requiring expert and coordinated management in all its phases, I think their judgment should be conclusive upon any matter which, like this one, is open to reasonable difference of opinion. Their specialized experience gives them an advantage judges cannot possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it. Accordingly their judgment in such matters should be overturned only where there is no reasonable basis to sustain it or where they exercise it in a manner which clearly exceeds their statutory authority.

In this case I cannot say that either of these things has occurred. The Board made its determination after the required statutory hearing on notice. 48 Stat. 162, 193, 12 U. S. C. § 77. The consideration given was full and thorough, including detailed findings of fact and conclu-

sions of law, followed by a carefully written opinion.[1] The Board concluded that "primarily" in § 32 does not mean "first in volume in comparison with any other business or businesses in which it [the employer] engages,"[2] but means rather as "a matter of primary importance," like "primary" colors or planets or as the word is used in the phrase "the primary causes of a war." This view it found not only supported by accepted dictionary meaning but also in conformity with Congress' intent as established by the legislative history. In a further ground which we must take as reflecting its specialized experience, the Board stated: "To say that a securities firm ranking ninth among the leading investment bankers of the country with respect to its total participations in underwritings of bonds, and for a period ranking first, should be held to be beyond the scope of the statute is to say that Congress enacted a statute with the intention that it would apply to no one."

I cannot say that the Board's conclusion, in the light of those groundings, is wanting either for warrant in law or for reasonable basis in fact. The considerations stated in the Court's opinion and in the dissenting opinion filed in the Court of Appeals, 153 F. 2d 785, 795, as well as by the Board itself, confirm this view. I think it important, not only for this case but for like ones which may arise in the future, perhaps as a result of this decision, to make clear that my concurrence in the Court's disposition of the case

[1] The opinion is not reported, pursuant to the statutory prohibition, 12 U. S. C. § 77, which is effective except in connection with proceedings for enforcement.

[2] Under such a view, in cases involving different facts the question would become judicial whether "primarily" means more than half of (1) the gross volume of business done; (2) the gross profit; (3) the net profit, where some but not all these factors as relating to one phase of the total activities carried on amounts to more than half the gross. Such discriminations would seem to be clearly within the Board's power to determine in the first instance. If so, it is difficult to see why that power does not include the determination made here.

is based upon the ground I have set forth, and not upon independent judicial determination of the question presented on the merits. I do not think this Court or any other should undertake to reconsider, as an independent judgment, the Board's determination upon that question or similar ones likely to arise, if the Board was not without basis in fact for its judgment and does not clearly transgress a statutory mandate. More than has been shown here would be required to cause me to believe that the Board has exceeded its power in either respect.

MR. JUSTICE FRANKFURTER joins in this opinion.